IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

METHANEX CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

MEMORIAL ON JURISDICTION AND ADMISSIBILITY OF RESPONDENT UNITED STATES OF AMERICA

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MEMORIAL ON JURISDICTION AND ADMISSIBILITY OF RESPONDENT UNITED STATES OF AMERICA

In accordance with the Tribunal's order announced at the Second Procedural Hearing, the United States respectfully submits this memorial on jurisdiction and admissibility.

PRELIMINARY STATEMENT

Methanex's claims do not remotely resemble the type of grievance that the NAFTA Parties consented to submit to arbitration pursuant to Chapter Eleven of that agreement. At bottom, Methanex's claims boil down to a concern that government regulation may, because of its effect on actors several steps removed on the supply chain, change the general business environment in which Methanex operates. Every government action, however, has ripple effects throughout society. Recognizing standing in a remotely affected party who alleges a government

taking of expectations rather than property rights would radically expand the scope of the NAFTA and potentially expose States to massive liability.

Methanex no doubt is disappointed that California's decision to address the contamination of its drinking-water by MTBE may have spillover effects on the global market for methanol. But the "NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides."[1]

The jurisdiction of international tribunals in investor-State disputes rests upon the consent of the State party. Because of the primacy of consent, the Tribunal must be satisfied that the United States has consented to the adjudication in the express terms of the agreement on which the claim is based. International tribunals have repeatedly insisted on an "'unequivocal indication' of a 'voluntary and indisputable' acceptance" by a sovereign of the tribunal's jurisdiction.[2] The United States' consent to arbitrate under Chapter Eleven does not extend to Methanex's claims for several reasons.

First, Methanex is far too removed from the California actions at issue to invoke the jurisdiction of this Tribunal. Methanex does not manufacture or sell gasoline, the focus of those actions. Methanex does not even manufacture or sell MTBE, the gasoline additive that has caused such concern about gasoline sold in California. Methanex manufactures and sells methanol, merely one of the ingredients in the manufacture of MTBE. Even if the actions at

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[1] *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, 14 Foreign Inv. L.J. 538, 562 ¶ 83 (1999) (Nov. 1, 1999) (Award).

[2] *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn.-Herz. v. Yugo.), 1993 I.C.J. 325, 342 ¶ 34 (Sept. 13); *accord Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, 1995 I.C.J. 6, 63-64 (Feb. 15) (diss. op.); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 260 (3d ed. 1999) ("An arbitral tribunal may

issue constituted a ban of the sale of California gasoline containing MTBE, which they clearly do not, they would impact Methanex only remotely, as a result of a decreased demand for methanol by the much more directly affected manufacturers of MTBE. Under fundamental principles of customary international law reflected in the requirements of Article 1116(1), this Tribunal lacks jurisdiction over Methanex's claim because the losses it alleges could result only from these measures' potential effect on Methanex's prospective contractual counterparties. Such purported losses were thus neither "incurred . . . by reason of, or arising out of," a breach of the NAFTA. Where, as here, the pleadings do not, and cannot, allege facts to establish that the supposed breach was the proximate cause of the claimed injuries, the claims do not fall within the consent to arbitrate in Article 1116(1).

Second, Methanex fails to identify any right belonging to it that is implicated by the measures at issue. Specifically, Methanex fails to identify any property right or property interest constituting an "investment" that it claims to have been expropriated in breach of Article 1110. Instead, Methanex's claim is essentially that the measures in question will impact its *expectation* that some of its customers will continue to buy as much methanol from it in the future as they do now. Neither international law nor the NAFTA recognizes such an expectation as a property right or interest, and thus as an "investment" under Chapter Eleven. An Article 1110 claim does not fall within the scope of Chapter Eleven if nothing that qualifies as an "investment" is alleged to have been expropriated.

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only validly determine those disputes that the parties have agreed that it should determine," and the tribunal "must take care to stay within the terms of this authority.").

Methanex also fails to identify any legal right incorporated into Article 1105(1)'s requirement of "treatment in accordance with international law" that is implicated by the measures at issue. Customary international law imposes no constraints on the process by which States adopt their laws and regulations of general application. And no substantive standard of customary international law is implicated by measures such as these – except for the standard for expropriation without compensation which, as discussed, Methanex cannot meet for failure to identify an investment. Methanex's claim under Article 1105(1) is inadmissible on its face. And its failure to plead any claim within the jurisdiction of this Tribunal requires that its claims be dismissed.

Third, the measures at issue do not "relate to" Methanex or its investments within the meaning of Article 1101, the provision that defines the scope and coverage of Chapter Eleven. The measures appropriate money for a university study and task state agencies with developing a timetable for further agency action on gasoline containing MTBE. Neither effects a ban of California gasoline containing MTBE as Methanex suggests. However, even if they did effect such a ban and would have some effect on Methanex or its investments, the connection between the measures and Methanex or its investments would be too attenuated to be legally significant. The measures therefore do not "relate to" Methanex's investments, and Methanex's claims are outside the scope of Chapter Eleven.

Fourth, because the measures at issue do not regulate the conduct of any member of the public, Methanex could not – as a matter of law – have suffered any cognizable loss necessary to support jurisdiction under Article 1116. Chapter Eleven does not permit investors to challenge *proposed* rules or regulations contemplated by a State. Neither of the measures

challenged here banned gasoline containing MTBE. Methanex's strained and unsupportable reading of the measures cannot justify its commencement of this arbitration almost a year before any phase-out became law in California. Indeed, the public relations campaign that accompanied Methanex's filing of its notice of intent – at a time when regulators were still conferring on a timetable for agency action on MTBE – implicates the very concerns that underlay Chapter Eleven's provision that no claim may be brought until six months after the events in question. And, in any event, Methanex cannot claim damages now for a ban that does not go into effect until 2003.

Fifth, Article 1116 – the sole basis asserted for jurisdiction over this claim – does not permit Methanex to assert in its own right the claims pleaded here. The bulk of Methanex's claims are for injuries purportedly suffered by its affiliated companies in the United States. Neither Article 1116 nor the principles of customary international law against which it was adopted, however, permit a shareholder to claim in its own right for injuries to a corporation. The remainder of Methanex's claims are for purported injuries to it as a producer and seller of methanol on the global market. Those claims, however, have nothing to do with Methanex's investments in the United States. Chapter Eleven is an investment chapter. It provides no jurisdiction for claims asserted in any capacity other than that of an investor.

Finally, the Tribunal is not seized of jurisdiction because Methanex has failed to provide the waivers required as a precondition to jurisdiction under Article 1121.

FACTS[3]

The Actions of the State of California

On October 8, 1997, the Governor of California approved California Senate Bill 521 (the "Bill"). The Bill provided $500,000 for the University of California to conduct a study and assessment of the human health and environmental risks and benefits associated with the use of MTBE.[4] The Bill also required that, after considering the University's report, peer-review comments and public testimony, the Governor certify whether using MTBE in gasoline in California posed a significant risk to human health or the environment and, if so, to take "appropriate action."[5]

In November 1998, the University of California issued a report entitled *Health & Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California as Sponsored by SB 521* (the "UC Report"). The UC Report found that if the use of MTBE in California were to continue at its current level, the state would face an increased danger of surface and groundwater contamination. The UC Report concluded that the cost of treatment of MTBE-contaminated drinking water sources in California could be enormous. Moreover, the UC Report concluded that MTBE is an animal carcinogen with the potential to cause cancer in humans. To remedy the problems confronting California's water

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[3] The facts relied upon by the United States in this Memorial are those pleaded by Methanex and certain additional facts that the United States believes cannot reasonably be disputed. The United States accepts *arguendo* the facts pleaded by Methanex solely for purposes of its objections to the Tribunal's jurisdiction and in order to show that the claims as pled are beyond the scope of the United States' consent to submit to arbitration. The United States expressly reserves its right to controvert Methanex's allegations if it becomes necessary to do so.

[4] Bill § 3(a)-(c). A copy of the Bill is attached to the Statement of Defense and to the accompanying expert report of Joseph R. Grodin (Tab 1 of the Joint Submission of Evidence, Volume 1).

[5] Bill § 3(e)-(f).

supply, the UC Report recommended consideration of phasing out MTBE in gasoline over a period of several years.

On March 25, 1999, the Governor of California certified that the use of MTBE in California gasoline posed significant risk to the environment and signed Executive Order No. D-5-99 (the "Executive Order"). The Executive Order, among other things, provided as follows:

> The California Energy Commission (CEC), in consultation with the California Air Resources Board, shall develop a timetable by July 1, 1999 for the removal of MTBE from gasoline at the earliest possible date, but not later than December 31, 2002. The timetable will be reflective of the CEC studies and should ensure adequate supply and availability of gasoline for California consumers.[6]

The Executive Order also called for the California Air Resources Board ("CARB") to adopt regulations setting more stringent standards for California's gasoline, known as California Phase 3 Reformulated Gasoline ("CaRFG3") regulations.[7]

The CEC, in consultation with CARB, issued such a timetable in late June 1999. It concluded that the date for removal of MTBE from California's gasoline should be December 31, 2002.

On October 22, 1999, the staff of CARB released proposed CaRFG3 regulations, which included, among other things, a phase-out of the use of MTBE in California gasoline. Over a period of months, CARB held numerous public hearings and workshops and issued a number of revisions to the proposed amendments. CARB promulgated final CaRFG3 regulations in the summer of 2000. The final regulations went into effect on September 2, 2000.

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[6] Executive Order ¶ 4. The Executive Order is attached to the Statement of Defense and to the accompanying expert report of Joseph R. Grodin (Tab 1 of the Joint Submission of Evidence, Volume 1).

[7] *Id.* ¶ 6.

They provide, in part, that "[s]tarting December 31, 2002, no person shall sell, offer for sale, supply or offer for supply California gasoline which has been produced with the use of methyl tertiary-butyl ether (MTBE)."[8]

Methanex's Claims

On June 15, 1999 – while the CEC was deliberating on a timetable for removing MTBE from California's gasoline – Methanex Corporation ("Methanex") issued a press release stating that it had delivered a notice of intent to commence an arbitration against the United States based on the Executive Order.[9] On December 3, 1999, Methanex delivered a Notice of Arbitration and Statement of Claim to the United States. Methanex's claim addresses only the Bill and the Executive Order. It does not address the CaRFG3 regulations.

In its Statement of Claim, Methanex alleges that it is a Canadian producer and seller of methanol – not MTBE or gasoline.[10] It avers that it indirectly controls two affiliates in the United States: Methanex Methanol Company ("Methanex US") and Methanex Fortier, Inc. ("Methanex Fortier").[11] Methanex US is alleged to be a Texas general partnership, based in Dallas, that purchases methanol from Methanex for marketing in the North American market.[12] Methanex Fortier is described as a Delaware corporation that owns a methanol production

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[8] 13 CAL. ADMIN. CODE § 2262.6(a)(1) (West 2000). A copy of this regulation is attached to the accompanying expert report of Joseph R. Grodin (Tab 1 of the Joint Submission of Evidence, Volume 1).

[9] *See* News Release, Methanex Corporation, Methanex Seeks Damages under NAFTA for California MTBE Ban (June 15, 1999) (<http://www.methanex.com/investorcentre/newsreleases/nafta.pdf>).

[10] *See* Statement of Claim ¶ 1.

[11] *Id.* ¶ 2. Methanex has yet to explain in detail, much less prove, the chain of ownership by which it alleges that it controls Methanex US or Methanex Fortier. The United States reserves its right to raise further objections to the Tribunal's jurisdiction in the event that Methanex's evidence fails in this respect.

[12] *Id.* ¶¶ 2, 6.

plant in Fortier, Louisiana.[13] Methanex shut down that facility in early 1999, before the issuance of the Executive Order, and has not reopened it.[14]

Methanex alleges that a substantial percentage of Methanex US' sales are to MTBE producers. Such producers use methanol as one of the principal ingredients in the production of MTBE.[15]

Some of these MTBE producers supply MTBE for use in California gasoline.[16] About 70 percent of the MTBE consumed in California is produced by sources outside the United States, about 20 percent by producers in the United States along the Gulf of Mexico and about 10 percent by producers in California.[17] Methanex supplies methanol to each of these market segments.[18]

Although it does not produce or sell gasoline or MTBE, Methanex contends that a ban of California gasoline containing MTBE would cause foreign and domestic MTBE producers to purchase less methanol. It alleges that these decreased purchases by MTBE producers would lower the price of methanol on the global market and therefore adversely affect Methanex, Methanex US and Methanex Fortier.[19] Methanex claims damages in the form of "lost profits

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[13] *Id.*¶¶ 2, 5.

[14] *Id.*¶ 5.

[15] *Id.*¶ 7.

[16] *Id.*

[17] Claimant's Reply to the Statement of Defense (dated Aug. 28, 2000) ¶ 9.

[18] *Id.*

[19] *Id.*¶ 1 ("any measure to eliminate MTBE in California or the United States impacts the global market for methanol.").

associated with the lost methanol sales to the MTBE market; margin losses on the balance of methanol sales due to the negative demand shock;" and unspecified "direct expenses."[20]

Methanex claims that the Executive Order and the Bill constitute an expropriation under Article 1110 of the NAFTA and violate the requirement of "treatment in accordance with international law" under Article 1105(1). Methanex contends that the measures expropriated certain "property" of Methanex US, which it describes as "Methanex US' business of selling methanol for use in MTBE in California,"[21] "goodwill" in the form of "[c]ustomers cultivated by Methanex U.S."[22] and "Methanex U.S.' access to the U.S. market."[23] Methanex's pleadings do not specify any rule of customary international law incorporated into Article 1105(1) and implicated by the measures at issue.[24]

Methanex attached as Schedule 1 to its Notice of Arbitration an instrument that purported, as contemplated by Article 1121, to waive any right to pursue claims concerning the Bill or the Executive Order in other fora. The instrument was executed in the name of Methanex by its Corporate Counsel and Assistant Corporate Secretary. It purported to waive rights not only on Methanex's behalf, but also on behalf of Methanex US and Methanex Fortier – companies that Methanex allegedly indirectly controls through undisclosed affiliates. Methanex, which is apparently not even a shareholder of those companies, provided no evidence that it had authority to execute such an instrument on their behalf.

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[20] *Id.* ¶ 87.
[21] Statement of Claim ¶ 35.
[22] Reply to the Statement of Defense ¶ 68.
[23] *Id.* ¶ 70.
[24] *See id.* ¶¶ 76-77.

On October 4, 2000, and in response to the United States' First Document Request, Methanex provided the United States with certain documents entitled "written consents" of Methanex Fortier and the partners of Methanex US.[25] The consents recite that the companies in question waive their rights to initiate or continue proceedings in other fora with respect to the arbitration pending before this Tribunal. The consents do not, however, purport to waive the companies' rights to initiate or continue proceedings with respect to the Executive Order or the Bill.

APPLICABLE STANDARDS OF TREATY INTERPRETATION

The determination of this Tribunal's jurisdiction, and the admissibility of Methanex's claims, calls for an interpretation of the provisions of NAFTA Chapter Eleven. The United States therefore reviews briefly below principles of treaty interpretation common to each of its arguments.

The preeminent codification of customary international law on the interpretation of treaties is Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"). Article 31(1) of the Vienna Convention sets forth the cardinal rule in construing international agreements such as the NAFTA: they must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in

[25] The consents are attached as Exhibit B to the Expert Report of Professor Robert W. Hamilton ("Hamilton Rep.") (Tab 2 of the Joint Submission of Evidence, Vol.1).

their context and in the light of its object and purpose."[26] The context includes the treaty's text, its preamble and annexes and any related agreements or instruments. *Id*. art. 31(2). Consistent with Article 31, treaties must be construed to avoid unreasonable results.[27]

Pursuant to Article 31(3)(c) of the Vienna Convention, "[t]here *shall* be taken into account, together with the context: . . . any relevant rules of international law applicable in the relations between the parties." (Emphasis supplied.) Thus, the Tribunal must consider rules of customary international law applicable between the Parties in interpreting the NAFTA's provisions.[28]

This requirement is confirmed by the express terms of the NAFTA, which expressly require Chapter Eleven tribunals to refer to customary international law principles of treaty interpretation. Article 102(2) requires that the NAFTA be interpreted and applied "in the light

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[26] *Accord Anglo-Iranian Oil Co*. 1952 I.C.J. 93, 104 (July 22) ("[The Court] must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.").

[27] *See, e.g*., *Polish Postal Service in Danzig*, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16) ("It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, *unless such interpretation would lead to something unreasonable or absurd*.") (emphasis added); 1 L. OPPENHEIM, INTERATIONAL LAW § 554(1), (3) (H. Lauterpacht ed., 8th ed. 1955) [hereinafter OPPENHEIM, INTERNATIONAL LAW] ("All treaties must be interpreted according to their reasonable, in contradistinction to their literal, sense. . . . If, therefore, the meaning of a provision is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable.").

[28] *See ,e.g*., *Right of Passage Over Indian Territory* (Port. v. India), 1957 I.C.J. 124, 142 (Nov. 26) ("It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."); *Kronprins Gustaf Adolph*, *reprinted in* 26 AM. J. INT'L L. 834, 839-40 (1932) (decision of 1932) ("[I]t may be safely assumed that, when the said treaties were concluded, both parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them."); 1 OPPENHEIM, INTERATIONAL LAW § 554(3) ("It is taken for granted that the contracting parties intend something reasonable and something not inconsistent with generally recognized principles of International Law . . . ."); JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 160 (1999) ("Les conventions . . . sont censées être adoptées en conformité avec le droit international general en vigeur.") ("Conventions . . . are viewed as having been adopted in conformity with the general international law in force.") (translation by counsel).

of its objectives . . . and in accordance with applicable rules of international law."[29] Moreover, Article 1131(1) requires that Chapter Eleven tribunals "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Thus, the NAFTA requires Chapter Eleven tribunals to apply rules of customary international law both in interpreting the NAFTA's provisions and as a rule of decision in the cases before them.

Article 31(3)(b) of the Vienna Convention requires the Tribunal to take into account, together with the context of the treaty terms, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." In Chapter Eleven arbitrations, non-disputing NAFTA Parties sometimes take positions in Article 1128 submissions that coincide with those of the respondent Party on the proper interpretation of the NAFTA. Such submissions constitute a "practice . . . establish[ing] the agreement of the parties regarding [the NAFTA's] interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention. The eventual submissions of Canada and Mexico in this case may reflect such an agreement here.

Finally, an important aspect of Chapter Eleven's context are its provisions permitting a private person to directly claim against a State in arbitration. Under the restrictive interpretation doctrine, any ambiguity in clauses granting jurisdiction over disputes between States and private persons must be resolved in favor of State sovereignty: "If . . . the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming the

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[29] *See also* Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* Canada Gazette 68,76 (194) ("Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties*.") (emphasis supplied).

obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[30] To do otherwise on the basis of ambiguous language would ignore the "fundamental principle of international judicial settlement" that a tribunal "not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt."[31]

Although the restrictive interpretation doctrine is no longer considered to apply in disputes between States (where its application could lead to restrictions on the obligations of one State to the detriment of any benefits in a treaty provided to another State),[32] the doctrine is an applicable interpretive canon in investor-State disputes such as this one, where only one party to the dispute was a Party to the underlying agreement. In the context of interpretive disputes between an investor and a State, the claimant investor possesses no sovereign interest that would militate against the presumption in favor of the sovereignty of the respondent State.

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[30] 1 L. OPPENHEIM, INTERNATIONAL LAW § 554(5).

[31] *Certain Norwegian Loans* (Fr. v. Nor.), 1957 I.C.J. 9, 58 (July 6) (sep. op. Lauterpacht, J.).

[32] *See* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 267 (1998).

ARGUMENT

I. THE TRIBUNAL LACKS JURISDICTION OVER METHANEX'S CLAIMS BECAUSE THE ALLEGED DAMAGES ARE TOO REMOTE

Methanex has submitted its claims under the authority of Article 1116 of the NAFTA. Article 1116, however, only authorizes claims where the investor has suffered loss or damage "incurred by reason of, or arising out of," the breach of one of the listed NAFTA provisions. Here, the alleged losses of Methanex and its affiliates were not incurred by reason of, or arising out of, the alleged breaches of Chapter Eleven because they are far too removed to be considered as having been proximately caused by such alleged breaches.

First, as demonstrated below, proximate causation is a well-settled principle of international law that is reflected in Article 1116(1) of the NAFTA as a prerequisite to jurisdiction. Second, the requirement of proximate causation cannot be satisfied where the injuries are an indirect and remote consequence of nondiscriminatory measures of general applicability that are not intentionally wrongful. Methanex's alleged injuries (and those of its investments) clearly are a remote and indirect consequence of the subject measures. Where, as here, the alleged injuries result only from the measures' effects on third parties, international arbitral tribunals have repeatedly held such injuries to be too remote to be actionable. Because the claimed injuries on their face are too far removed from the measures at issue to be cognizable under the international law standards reflected in Article 1116(1), no claim is presented with respect to which this Tribunal is seized of jurisdiction.

A. Proximate Cause Is A Well-Settled Principle Of International Law That Is Reflected In Article 1116(1) As A Jurisdictional Prerequisite

Article 1116(1) and Article 1117(1) identify the class of claims that the NAFTA Parties consented to submit to arbitration. The scope of the Parties' consent is limited to claims that (*a*) are brought by an investor of another NAFTA Party; (*b*) allege that the Party breached an obligation owed the investor or its investment under Section A of Chapter Eleven; and (*c*) aver that the investor "incurred loss or damage *by reason of, or arising out of*, that breach." NAFTA art. 1116(1) (emphasis supplied). Where, as is the case here, it is apparent from the face of the pleadings that any purported injury could not have been incurred "by reason of, or arising out of," the alleged breach, the claim is not within the class that the NAFTA Parties consented to arbitrate under Chapter Eleven.

A loss or damage is not incurred "by reason of, or arising out of" a breach within the meaning of Article 1116(1) unless the alleged breach is the proximate cause of the claimed losses. This conclusion follows for four reasons.

First, the ordinary meaning of the terms "by reason of" and "arising out of" in their context incorporates the requirement of proximate causation. *See* Vienna Convention art. 31(1). Such terms, when used in a provision specifying the relationship between an alleged breach and an alleged loss required for a claim to be arbitrable, naturally refer to the ordinary standard for such a relationship – that of proximate causation. In *Hoffland Honey Co. v. Nat'l Iranian Oil Co.*, 2 Iran-U.S. Cl. Trib. Rep. 41 (Jan. 26, 1983) (Award No. 22-495-2), the Iran-United States Claims Tribunal was called upon to construe such a provision in the Claims Settlement Declaration between the United States and Iran. Article II(1) of that declaration

gave the tribunal jurisdiction over claims, among others, that "*arise out of* . . . measures affecting property rights . . . ." (Emphasis supplied.) The tribunal held that the phrase "arise out of" reflected the requirement of proximate causation. The measures at issue could constitute

> "measures affecting [Hoffland's] property rights" within the meaning of Article II(1) of the Claims Settlement Declaration *only* if those [measures] were the *proximate cause* of the injuries . . . . If not, there was no conduct attributable to [the respondent] over which we would have jurisdiction, even if the [measures] were unlawful.

2 Iran-U.S. Cl. Trib. Rep. at 42 (emphasis supplied). The tribunal then examined the pleadings to determine whether the claimant had alleged facts that could establish proximate causation. The claimant, an enterprise that produced honey, contended that its bee colonies had been damaged by certain agricultural chemicals. Although the respondent did not sell those agricultural chemicals, it did supply oil as a raw material to manufacturers of the chemicals in question. The oil sales were alleged to be measures affecting the claimant's bee colonies. The tribunal dismissed for lack of jurisdiction, holding that "it is clear from the pleadings and the evidence attached thereto that proximate cause has not been alleged." *Id.* Thus, *Hoffland Honey* demonstrates that the phrase "arising out of " in a context similar to that of Article 1116(1) naturally refers to proximate causation, and that proximate causation is patently absent where a claimant's alleged losses are as far removed from the respondent's acts as are Methanex's here.

Second, that "by reason of" and "arising out of" incorporate the requirement of proximate causation is clear in light of the object and purpose of the NAFTA in general and Article 1116(1) in particular. The relevant objectives of the NAFTA are to "increase

substantially investment opportunities in the territories of the Parties" and to "create effective procedures for . . . the resolution of disputes." NAFTA art. 102(1)(c), (e).

As discussed in greater detail in the pages that follow, proximate causation has long been a fundamental element in the resolution of disputes concerning State responsibility for breaches of obligations to alien investors. The purpose of increasing investment opportunities is properly served by standards that protect such investments from injuries proximately caused by wrongful state action. Expanding a State's exposure to responsibility beyond such well-established limits does not serve that purpose and, indeed, could lead to defensive actions that discourage foreign investment. The principle of proximate causation closely ties a State's potential liability to the claimed breach, thereby providing a proportionate incentive for States to achieve the NAFTA's objective of substantially increasing investment opportunities – without deforming that objective into an unlimited insurance policy for all investments against all forms of risk.

Third, proximate causation is an established "rule of international law applicable in the relations between the parties" that, as shown above, must be taken into account in interpreting Article 1116(1). *See supra* at 12. In customary international law, proximate or legal cause embodies the concept that an actor, such as a State, is liable only for those injuries that are not remotely related to its wrongful acts or omissions; whether an injury is remote is a legal question.[33] In *Hoffland Honey*, the tribunal stated: "What we do mean by the word

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[33] *See* James Crawford, Special Rapporteur, *Third Report On State Responsibility*, U.N. Int'l Law Comm'n, 52nd Sess. at 15 ¶ 27, U.N. Doc. A/CN.4/507 (2000) ("State responsibility is not determined simply on the basis of 'factual causality'. Rather, the allocation of harm or loss to a wrongful act is, in principle, a legal and not a merely historical or causal process."); *see also, e.g.*, BIN CHENG, GENERAL PRINCIPLES OF LAW 245 (1953) ("[I]t would seem that the Umpire of the German-United States Mixed Claims Commission (1922)

'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." 2 Iran-U.S. Cl. Trib. Rep. at 42.

Proximate cause is a well-established principle of customary international law, as well as municipal law. *See Administrative Decision No. II* (U.S. v. Germ.), 7 R.I.A.A. 23, 29 (Germ.-U.S. Mixed Claims Comm'n 1923) (proximate cause is "a rule of general application both in private and public law – which clearly the parties to the Treaty had no intention of abrogating."); *United States Steel* (U.S. v. Germ.), 7 R.I.A.A. 44, 54-55, 58-59, 62-63 (Germ-U.S. Mixed Claims Comm'n 1923) (rejecting on proximate cause grounds a group of claims seeking reimbursement for war-risk insurance premiums); *Dix* (U.S. v. Venez.), 9 R.I.A.A. 119, 121 (Am.-Venez. Comm'n, undated decision) ("International as well as municipal law denies compensation for remote consequences, in the absence of evidence of deliberate intention to injure.").[34] For example, Professor Bin Cheng notes that

> it is "a rule of general application both in private and public law," equally applicable in the international legal order, that the relation of cause and effect operative in the field of reparation is that of proximate causality in legal contemplation. . . . Hence the maxim: *In jure causa proxima non remota inspicitur*. Even in cases of "assumed responsibility," with which the German-

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purposely used the phrase 'in legal contemplation' when invoking the principle of proximate causality. This principle is a legal nexus of cause and effect . . . ."); W. PAGE KEETON ET AL., LAW OF TORTS § 41, at 264 (5th ed. 1984) (Proximate cause "is to some extent associated with the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains. Often to greater extent, however, the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.").

[34] *See also, e.g., H. G. Venable* (U.S. v. Mex.), 4 R.I.A.A. 219, 225 (Mex.-U.S. Gen. Claims Comm'n 1927) (Mexican official wrongfully sent a telegram ordering that four United States locomotives not leave Mexico, where they were subsequently destroyed. The Commission stated that although "[l]inked up with subsequent occurrences" the telegram may have been the cause of the damages, "[i]t is clear, however, that only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his telegram.").

> United States Mixed Claims Commission (1922) was concerned, derogation from this principle is not to be presumed.

BIN CHENG, GENERAL PRINCIPLES OF LAW 244-45 (1953). Proximate causation's status as a rule of customary international law applicable in the relations between the NAFTA Parties provides further evidence that Article 1116(1) reflects that principle – particularly given the absence of any language in that article suggesting that the Parties intended to depart from this established rule.

Finally, construing Article 1116(1) to allow remote claims would lead to manifestly unreasonable results. For example, it is accepted law that a State that expropriates a factory for a public purpose must pay prompt and adequate compensation to the factory owner. Methanex effectively suggests, however, that Article 1116(1) requires the State *also* to pay compensation to every supplier of raw materials to the factory, and each supplier's supplier. Methanex's suggestion would increase State liability for public takings exponentially and far beyond reason. An enormous number of local, state, provincial and federal regulatory and other measures are routinely promulgated that, by directly affecting one line of business, indirectly impact many other contractually related lines of business. Under Methanex's reading of Article 1116(1), "no treasury would be rich enough to make payment" to all potential claimants. 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1784 (1943) (quoting 1911 decision of Nicaraguan Mixed Claims Commission denying claims for indirect damages, including claims for

"'paralyzation of the [claimants'] business during the war'"). Accepted principles of treaty interpretation do not permit such an unreasonable result.[35]

For all of these reasons, Article 1116(1)'s requirement that any arbitrable claim must be for loss "by reason of, or arising out of," a breach of Chapter Eleven incorporates the customary international law principle of proximate causation.[36]

B. Methanex's Alleged Injuries On Their Face Were Not Proximately Caused By The Subject Measures

As demonstrated below, first, the international standard of proximate causation reflected in Article 1116(1) does not permit claims for injuries that are a remote and indirect consequence of the alleged wrongful acts. Second, Methanex's claims on their face are far too indirect to be cognizable under Article 1116(1). International tribunals have repeatedly rejected claims based on a significantly closer connection between act and injury than Methanex can allege here.

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[35] This interpretation of Article 1116(1) is confirmed by application of the doctrine of restrictive interpretation under which any ambiguity in Article 1116(1)'s jurisdictional grant must be resolved in favor of the sovereignty of the NAFTA Party involved.

[36] Even if this Tribunal were to hold that the requirements of Article 1116(1) are not jurisdictional prerequisites, the issue of proximate cause should be decided now: "No purpose . . . would be served by undertaking an examination of the merits in the case for the purpose of reaching a decision which . . . ineluctably must be made." *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 15, 38 (Dec. 2); *see also, e.g.*, *Nuclear Tests I* (N.Z. v. Fr.), 1974 I.C.J. 457, 463 (Dec. 20) (explaining the necessity of examining as a preliminary question "the existence of a dispute"); *Nuclear Tests II* (Austl. v. Fr.), 1974 I.C.J. 253, 260 (Dec. 20) (same); *South-West Africa* (Eth. v. S. Afr.; Lib. v. S. Afr.), 1966 I.C.J. 6, 18, 51 (July 18) (finding that because the claimants lacked "any legal right or interest to them in the subject matter of the present claims," they lacked "standing" to pursue a claim on the merits); *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (dismissing the claim without reaching the merits because the claimant failed to show the validity of its national's naturalization). This is especially the case given that deciding the merits of Methanex's claims may well require resolving complicated questions of law and fact. *See, e.g.*, *Bank Markazi Iran v. Federal Reserve Bank of N.Y.*, Award No. 595-823-3, ¶ 35 (Iran-U.S. Cl. Trib. June 13, 2000) (dismissing claim on the merits without resolving a jurisdictional issue given "the relatively straightforward nature of the merits, and of the decision relating thereto, and in the interests of judicial (here Tribunal) economy").

1. The alleged injuries clearly are a remote and indirect consequence of the subject measures

Where, as here, there is no allegation that the subject measures are discriminatory, intentionally wrongful or other than of general applicability, injuries suffered as an indirect and remote consequence of the measures do not give rise to an international claim.[37] As demonstrated in Part IV below, Methanex's contention that the Bill and the Executive Order banned the use MTBE in California gasoline is without merit. Even accepting Methanex's characterization of those measures as a ban for purposes of this argument, however, Methanex's alleged injuries would clearly be indirect and remote. Under the facts pled by Methanex, all of its alleged injuries result solely from the measures' effect on actual or potential contracts between Methanex or its investments and entities that may modify their activities because of the subject measures. The chain of alleged causation is as follows:

- California gasoline distributors now selling gasoline containing MTBE will stop making or buying such gasoline as a result of a ban on the sale or supply of gasoline containing MTBE;

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[37] U.N. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Second Session*, at 32 ¶ 97, U.N. Doc. No. A/55/10 (2000) ("The view was expressed that the obligation of reparation did not extend to indirect or remote results flowing from a breach, as distinct from those flowing directly or immediately. . . . Similarly, the view was expressed that only direct or proximate consequences and not all consequences of an infringement should give rise to full reparation."); Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (Draft No. 12), art. 14(3), at 141 (Harvard L. Sch. 1961) ("Harvard Draft Convention") ("An injury is 'caused,' as the term is used in this Convention, by an act or omission if the loss or detriment suffered by the injured alien is the *direct consequence* of that act or omission.") (emphasis added); *id.* note to art. 14(3) at 145 (explaining that requiring a "direct consequence" "suggest[s] that there should be an immediate relationship between the particular act or omission and the injury to which it gave rise"); *see generally* BIN CHENG, GENERAL PRINCIPLES OF LAW 241 *et seq.* (1953) (collecting authorities).

The United States expresses no opinion here regarding the proper test of proximate cause in the context of measures that are discriminatory, intentionally wrongful or not of general applicability. *See* U.N. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Second Session*, at 32 ¶ 97, U.N. Doc. A/55/10 (2000) ("The Special Rapporteur noted that the application of the concept of 'remote damage' depended on the particular legal context and on the facts themselves.").

- these decreased sales will cause refineries and blenders now producing California gasoline to stop making or buying MTBE for such gasoline;

- the decreased purchases or production of MTBE for California gasoline will result in fewer purchases of methanol as a feedstock for MTBE production;

- the decreased purchases of methanol will – if there are no offsetting increases in demand for methanol – affect the profits of Methanex and possibly Methanex US by lowering the price and diminishing sales of methanol, and will possibly prolong the period of time the Methanex Fortier plant remains idle.[38]

Merely stating Methanex's theory of causation reveals the remote nature of its claimed injury. Any impact on Methanex will result only from anticipated effects on gasoline suppliers, which will result in secondary effects on supply contracts with MTBE producers, which, in turn, will result in tertiary effects on methanol producers like Methanex. Thus, Methanex's claimed injury stems solely from the measures' alleged indirect effects on MTBE producers with whom Methanex hopes to have contractual relations in the future. As demonstrated below, claims far less attenuated than this one have repeatedly been rejected by international tribunals. A similar result is called for here.

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[38] These potential indirect effects on actual or potential contractual relations are the only sources of all of Methanex's alleged losses: (1) loss of "consumer base, good will and market for methanol;" (2) loss because "of the decline in the global price of methanol;" (3) loss of return on capital investments "made in developing and serving the MTBE market;" (4) loss "due to the increased cost of capital;" and (5) "loss to Methanex of a substantial amount of its investment in Methanex US and Fortier." Statement of Claim at 12 ¶ 38.

2. International tribunals applying the international law principles reflected in Article 1116(1) have routinely held injuries such as those alleged here to be too remote

International arbitral tribunals applying the customary international law principle of proximate causation reflected in Article 1116(1) have repeatedly rejected claims more compelling than those of Methanex. International tribunals, in a variety of contexts, have found claims to be too remote when the alleged injury resulted only from the measure's effect on a third person with whom the claimant had contractual relations. Methanex, notably, does not allege that the measures in question will cause its counterparties to be unable to perform their contractual obligations. Instead, Methanex appears to contend only that measures in question will cause its customers not to renew existing contracts or to decline to enter into new contracts with it or its affiliates. Methanex's claims necessarily are even less direct than those addressed in the following paragraphs.

International tribunals have consistently denied life insurers' claims for losses arising from the premature deaths of insureds. For example, under the Treaty of Berlin, which required compensation for losses caused *even indirectly* by Germany, the German-United States Mixed Claims Commission rejected insurers' claims for losses resulting from the premature deaths caused by Germany's sinking of the *Lusitania* in World War I: "Although the act of Germany was the immediate cause of maturing the contracts of insurance . . . this effect so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote – not in time – but in natural and normal sequence." *Provident Mutual Life Ins.* (U.S. v. Germ.), 7 R.I.A.A. 91, 112-13 (U.S.-Germ. Mixed Claims Comm'n 1924). The Commission explained: "the act of Germany in striking

down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death." *Id*. at 116.

Tribunals also have routinely denied claims for injuries arising solely from the unintended, incidental effects of nondiscriminatory measures on creditors, where those measures resulted in the insolvency of debtors.[39] For example, the Mexican-United States Claims Commission concluded:

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[39] *See, e.g., Biens Britanniques au Maroc Espagnol (Réclamation 53 de Melilla - Ziat, Ben Kiran)* (Spain v. G.B.), 2 R.I.A.A. 729, 729-30 (1925) ("Dans ces circonstances, il serait nécessaire . . . d'examiner les mérites de chaque cas d'espèce afin de déterminer si le dommage dont il s'agit a frappé immédiatement la personne en faveur de laquelle la Réclamation fut présentée, ou si cette personne n'est que le créancier d'une autre personne qui serait, elle, immédiatement frappée.") ("In these circumstances, it would be necessary . . . to examine the merits of each case in order to determine if the damage in question has immediately impacted the person in favor of whom the Claim had been presented, or if such person was only the creditor of another person who was immediately impacted.") (translation by counsel); *Estate of Dr. J. A. Thornhill* (U.S. v. Mex.), Special Mexican Claims Commission: Report to the Secretary of State 399, 399 (undated decision) (disallowing claim because decedent's deposit apparently was not "segregated from other funds in the possession of the bank so as to give him a status other than that of a creditor of the bank and make his loss a proximate consequence" of covered acts); *Fink* (U.S. v. Mex.), Special Mexican Claims Commission: Report to the Secretary of State 408, 408 (undated decision) (disallowing claim where purchaser's alleged inability to pay for property resulted from acts of armed forces: although title "appears to have passed to the purchaser . . . [a]ny loss suffered by this vendor as a consequence of acts of armed forces affecting the purchaser and the purchaser's property is not deemed to be a loss proximately resulting from the acts of forces involving Mexican liability under the Convention . . . ."); *see also* Gillian M. White, *Wealth Deprivation: Creditor and Contract Claims*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 171, 177 (Richard B. Lillich ed., 1983) ("Tribunals applying general international law . . . have rejected claims on behalf of the unsecured creditor. The common basis for rejection has been a lack of direct injury committed by the respondent State to any legal right of the creditor. As suggested earlier, this conclusion is firmly grounded in principle."); Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71, 72 (1965) ("If a person owing a debt to a foreigner is affected in his right by an act contrary to International Law, this does not authorize the State of nationality of the foreign creditor to act in protection of his interests. . . . This question came before arbitral tribunals several times and 'it was repeatedly decided that creditors had no footing because of wrongs committed towards their debtors.'") (quoting JACKSON H. RALSTON, LAW AND PROCEDURE OF INTERNATIONAL ARBITRAL TRIBUNALS, 158 (1926 ed.)); *In re Skins Trading Corp*. (U.S. v. Czech.), Foreign Claims Settlement Comm'n of the United States: Decisions and Annotations 402, 403 (1960) ("A majority of the Commission has consistently held . . . that the nationalization of a debtor company does not constitute a taking of the property of a creditor of the nationalized company, where there has been no annulment or repudiation of the debt."); *id*. at 404 ("[T]he weight of authority under international law [is] to the effect that such losses as a creditor may suffer as a result of a wrongful act committed against his debtor are not the proximate result of the wrongful act, and are too remote or indirect to sustain an award to the creditor.").

> A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature.

Dickson Car Wheel Co. (U.S. v. Mex.), 4 R.I.A.A. 669, 681 (Mex.-U.S. Gen. Claims Comm'n 1931).[40] Creditors' claims are inadmissible under customary international law if they stem solely from a measure's effects on the debtor: the action must directly affect the creditor's rights. *See, e.g.*, Gillian M. White, *Wealth Deprivation: Creditor and Contract Claims, in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 171, 175 (Richard B. Lillich ed., 1983) (sufficient causal connection exists if the government denies the creditor's legal remedies, or the wrongdoing constitutes a "confiscation of all the debtor's property or of the debtor enterprise as a whole" and the State does not assume the debts; in that case, "the creditors have suffered a direct and immediate loss, indistinguishable from the taking of a property right."); Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHILIPPINE INT'L L.J. 71, 73-74 (1965) ("[I]f the rights of creditors as such were directly affected, for instance, by denying them a right to sue or by refusing a mortgage owner the right to register title, then the interposition of a claim would be justified on the ground that a direct injury to an actual right, as different from an interest, has been sustained.").

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[40] *See* A.H. FELLER, THE MEXICAN CLAIMS COMMISSIONS 124 (1935) (noting, with reference to the facts of *Dickson Car Wheel*, 4 R.I.A.A. 669, that "[i]f the Mexican government had taken over the lines because it wanted to prevent the fulfillment of this or other contracts, it would be easier to say that the damage was 'direct' and to hold Mexico responsible. . . . At any rate, the notion that the prevention of the fulfillment of a contract is a taking of property, goes beyond the existing limits of the law and opens up an unbounded and unexplored range of state responsibility.").

Claims for indirect injuries arising from State actions that incidentally and unintentionally interfere with claimants' contractual relations with third parties are similarly denied.[41] For example, such a claim was denied in a dispute between Canada and the United States over damages caused by transboundary pollution. *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A. 1906, 1911 (first decision, 1938). Like Methanex here, the United States in *Trail Smelter* sought "'damages in respect of business enterprises'" on the ground that "'business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area.'" *Id.* at 1931. The tribunal rejected this claim because "damage of this nature 'due to reduced economic status' of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which indemnity can be awarded." *Id.* The tribunal noted that "[n]one of the cases cited by

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[41] *See, e.g., Leach v. Iran*, 23 Iran-U.S. Cl. Trib. Rep. 233 ¶ 21 (1989) (Award No. 440-12183-3) (dismissing a claim for loss of salary where Iran allegedly expelled claimant's employer, and, as a result, the employer terminated claimant's contract.); *M.A. Quina Export Co.* (U.S. v. Germ.), 7 R.I.A.A. 363, 363 (Germ.-U.S. Mixed Claims Comm'n 1926) (Germany held not liable for damages caused by ship owner's refusal to transport claimant's cargo through German blockade); *Hickson Case*, 7 R.I.A.A. 266, 268-69 (Germ.-U.S. Mixed Claims Comm'n 1924) (rejecting a claim for losses arising from the termination of contracts caused by the deaths of claimant's employees as a result of the sinking of the Lusitania: "Claimaint's counsel earnestly contends that where one without sufficient justification interferes with contract sanctioned by law to the injury of a third party to it, the wrongdoer must respond in damages to the injured party. . . . But the great diligence of claimant's counsel has pointed this Commission to no case, and it is safe to assert that none can be found, where any tribunal has awarded damages to one party to a contract claiming a loss as a result of a killing of a second party to such a contract by a third party not privy to the contract without any intention of disturbing or destroying such contractual relations."); *Dix* (U.S. v. Venez.), 9 R.I.A.A. 119, 121 (Am.-Venez. Comm'n, undated decision) (losses from selling cattle at a depressed price to avoid their requisition and from a damages payment caused by claimant's breach of contract (allegedly caused by the war) were not recoverable: "Interruption of the ordinary course of business is an invariable and inevitable result of a state of war. But incidental losses incurred by individuals, whether citizens or aliens, by reason of such interruption are too remote and consequential for compensation by the Government within whose territory the war exists."); *Pieri Dominique & Co.* (Fr. v. Venez.), Report of the French-Venezuelan Mixed Claims Commission of 1902 (Ralston) 185 (1906) (claimant awarded damages for certain injuries, but not for losses resulting from the sale of his houses under disadvantageous circumstances.); *French Co. of Venezuelan R.R.* (Fr. v. Venez.), Report of the French-Venezuelan Mixed Claims Commission of 1902 (Ralston) 367, 450-51 (1906) (liability attached for "injuries which resulted to the railroad and its properties when used by either the revolutionary or the governmental forces," but not for lost business because of the

counsel . . . sustain the proposition that indemnity can be obtained for an injury to or reduction in a man's business due to inability of his customers or clients to buy, which inability or impoverishment is caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity." *Id.*

Also, for example, in *Fraenkel* (U.S. v. Yug.), Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its Predecessors from Sept. 14, 1949 to March 31, 1955, at 156-59 (1954) (Decision No. 356), the Commission denied a claim arising from Yugoslavia's incidental, unintended interference with the claimant's contractual relations with third parties. The claimant, a wholesale paper business with contracts for the supply of paper, was unable to obtain paper with which to continue its business after Yugoslavia nationalized its economy. The Commission characterized the claim as "one for the potential value of the business, particularly the value of its contracts, operating relationships and goodwill – essentially, a claim for future earnings," *id.* at 156, and noted that "such loss as the claimant suffered resulted, indirectly, from the general process of nationalization." *Id.* at 157. Accordingly, the Commission found that the issue was "whether, when Yugoslavia took over all paper manufacturing and distribution facilities in Yugoslavia and, by indirection frustrated the exercise by claimant of his rights in the various contracts above-mentioned, it may be said to have 'taken' those rights." *Id.* at 158. The Commission concluded that "[t]he claimant may have suffered a substantial loss as a result of action taken by the Government of Yugoslavia: but

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war.); *cf. Urmston* (G.B. v. Mex.) 5 R.I.A.A. 291, 294 (1931) (deterioration of property value because of war not recoverable).

the Commission cannot find that this loss resulted from either the nationalization or other taking of his property." *Id.* at 159.[42]

Finally, even in contexts not involving a measure's effect on contractually related parties, international arbitral tribunals deny claims where the injuries were not a sufficiently direct consequence of the subject measures. In those cases, the alleged injuries were no more remote (and the policy grounds for denying liability no more compelling) than here. For example, in *Standard Oil Co. of N.Y.* (U.S. v. Germ.), 7 R.I.A.A. 301, 307 (Germ.-U.S. Mixed Claims Comm'n 1926), the Commission held that Germany could not be held responsible for losses to shipowners as a result of Great Britain's requisitioning their ships during wartime: "This act of Great Britain and the damages flowing therefrom are not attributable to Germany's act as a proximate cause."[43]

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[42] *See also, e.g.*, *In re Claim of Motion Picture Export Ass'n of America, Inc.* (U.S. v. Hung.), Foreign Claims Settlement Commission of the United States: Tenth Semiannual Report to the Congress for the Period Ending June 30, 1959, at 62, 63 (1958) (even if by nationalizing the motion picture industry in Hungary "Hungary may have interfered with the contracts to which claimant was a party[,] [this] does not constitute a taking of claimant's property. . . . Accordingly, the portions of the claim based upon contracts to show films in theatres in Hungary, and for consequential losses stated to have resulted from the fact that claimant *could no longer continue its business* in Hungary after the nationalization of the motion picture industry, are denied.") (emphasis added).

[43] *See also, e.g.*, *Garrett*, (U.S. v. Mex.), Special Mexican Claims Commission: Report to the Secretary of State 565, 565 (undated decision) (allowing recovery for "the loss of certain personal property and the loss of use of realty as a result of the forced abandonment of such property," but not for loss of commodities "owing to a delay in shipment caused by the interruption of transportation:" "Such a loss is a repercussion of general revolutionary conditions."); *American Chicle Co.*, Special Mexican Claims Commission: Report to the Secretary of State 591, 591 (undated decision) (allowing recovery "for direct losses due to the[] acts [of the revolutionaries] and to acts of Federal forces," but not for losses caused by the destruction of company property (and the resultant loss of production) by the company's manager "to prevent its falling into the hands of the revolutionaries," nor "for losses resulting from increased cost of chicle consequent upon the inability of the company to operate normally . . . [because] [s]uch losses are too speculative and, moreover, were repercussions of general revolutionary conditions and not proximately due to acts of specific forces creating liability under the Convention"); *Eastern Steamship Lines, Inc.* (U.S. v. Germ.), 7 R.I.A.A. 71 (Germ.-U.S. Mixed Claims Comm'n 1924) (even if business prudence required the purchase of war-risk insurance, because such purchase was an indirect result of Germany's acts, the premiums were not recoverable); *Barbes* (U.S. v. Turk.), American-Turkish Claims Settlement Under the Agreement of December 24, 1923: Opinions and Report 155, 157 (undated opinion) ("The prudent flight of persons from the theatre

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Thus, under established international law – as reflected in the holdings of numerous international arbitral tribunals in various contexts – injuries indirectly stemming from unintentionally wrongful, nondiscriminatory measures are too remote to be recoverable. Where, as here, all the alleged injuries solely relate to the measures' effects on third parties with whom the claimant is actually or potentially contractually tied, no international claim may lie. Methanex's claims are on their face too remote to be cognizable.

II. METHANEX FAILS TO IDENTIFY ANY RIGHT VIOLATED BY THE MEASURES AT ISSUE

It is a well-established principle of customary international law that to maintain a claim a *right* owed to the claimant must be violated – whether "the interests of the aggrieved are affected" is not relevant. *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3, 35 ¶ 44 (Feb. 5); s*ee also* Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT'L L.J. 71, 74 (1964) ("the indispensable legal basis of any valid international claim is the injury to a right and not the mere prejudice to an interest which has not yet crystallized into an actual right and which is not legally protected by a remedy under municipal law. Such a basic distinction between rights and interests has been recognized and proclaimed in *dicta* of the Permanent Court and of the present International Court.").

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of military operations does not entail responsibility on a belligerent government to make compensation for property left behind, unless the property is appropriated or wantonly destroyed.").

For the reasons detailed below, Methanex's claims fail to identify a legal right – as opposed to a mere economic interest – that is implicated by the measures at issue here. *First*, Methanex fails to identify a property right or property interest constituting an "investment" that could be expropriated under Article 1110. Neither the NAFTA nor international law recognizes a property right or property interest in the continued existence of a particular sub-market for a commodity or the continued desire of a specific block of customers to do business with an enterprise.

Second, Methanex's claim under Article 1105(1) similarly fails to identify a right to the treatment that it claims was denied by the adoption of the measures at issue. No international claim is admissible unless the claimant identifies an international obligation owed to it and allegedly violated by the acts averred to be wrongful.[44] There are no standards of customary international law incorporated into Article 1105(1) that address the process by which a State prescribes laws and rules of general application such as those at issue here. Nor do non-discriminatory measures such as these implicate any substantive standards of customary international law – except for the standard governing expropriation, which does not apply here for want of an "investment."

As discussed below, these failures are fatal to Methanex's claims.

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[44] *See, e.g.*, *Barcelona Traction, Light & Power* (Belg. v. Spain), 1970 I.C.J. 3, 32 ¶ 35 (Feb. 5) (Judgment) ("In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions: 'The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.'") (quoting *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 181-82 (Apr. 11). It is equally fundamental that issues of admissibility should properly be addressed as preliminary questions where, as is the case here, they present pure questions of law analytically distinct from the merits of the dispute. *See supra* note 36.

A. Methanex Fails To Identify An Investment That Would Give This Tribunal Jurisdiction To Entertain A Claim Under Article 1110

This Tribunal lacks jurisdiction to hear Methanex's claim that the United States has violated Article 1110 of the NAFTA because Methanex has failed to identify an investment to which the obligations of Article 1110 attach. Article 1110 of the NAFTA provides restrictions on a State Party's ability to expropriate the *investments* of investors of another State Party. Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an "investment" for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of "investment" in Article 1139, however, encompass a mere hope that profits may result from prospective sales to a particular segment of a market, which at bottom is what Methanex alleges in this case has been expropriated.

1. A customer base is not an investment capable of being expropriated

In its Notice of Arbitration, Methanex vaguely alleges that California's actions constitute an expropriation of Methanex US' and Methanex Fortier's "business," resulting in impairment and deprivation of Methanex US' and Methanex Fortier's economic value and causing a general depression of the global price of methanol, which will, in turn, cause Methanex to suffer losses. Notice of Arbitration at 8, Statement of Claim at 11 ¶ 35. As the United States pointed out in its Statement of Defense, none of these allegations identify an "investment" under Article 1139 that has purportedly been expropriated.

In its Reply, Methanex attempted to clarify what it alleges to have been expropriated by describing it as "[c]ustomers cultivated by Methanex U.S. [that are] known in law under the general heading of goodwill" and suggested that customer base falls within Article 1139's definition of investment. *See* Reply at 13 ¶ 68. Methanex asserts that its and its affiliates' customer bases constitute "investments" within subparagraphs (g) and (h) of Article 1139's definition. *See Id*. However, a customer base does not qualify as an investment under either of these Article 1139 definitions.

Subparagraph (g) of Article 1139 provides that "investment" means "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Subparagraph (h) of Article 1139 provides that "investment" means

> interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

To determine whether something falls within either subparagraph (g) or (h), one must first determine whether the thing sought to be protected constitutes "property" or an "interest," respectively, for which protection from expropriation is granted. Chapter Eleven does not define "property" or "interest." The ordinary meaning of each of these terms, however, viewed in the context of an investment protection regime like Chapter Eleven and in light of the

NAFTA's object and purpose, plainly is *property* rights and interests.[45] "Customers," clearly, do not constitute "property rights" or "property interests." Customers cannot be bought or sold, pledged, mortgaged, traded or otherwise disposed of in the same manner as rights under contracts, claims for money, stocks, bonds or any of the property interests in which one can invest. Thus, a customer base does not fall within the definition of "investment" according to that definition's plain meaning. Moreover, extending Chapter Eleven's protection of investments to a non-property interest that cannot be bought or sold does nothing to further the NAFTA's objective of "increas[ing] substantially investment opportunities in the territories of the Parties." NAFTA art. 102(1)(c).

As previously noted, Article 31(3)(c) of the Vienna Convention requires the Tribunal to "take[] into account . . . any relevant rules of international law applicable in the relations between the parties." It is a principle of customary international law that in order for there to have been an expropriation, a *property* right or interest must have been taken. *See, e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) ("[O]nly *property* deprivation will give rise to compensation.") (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) ("Once it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of expropriation."). Because a customer base is not, by itself, a

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[45] *See* BLACKS LAW DICTIONARY 812 (6th ed. 1990) (defining "interest" as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something. . . . More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title"); BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 264 (4th ed. 1995) (defining "interest" as

property right or interest capable of being expropriated, Methanex has failed to identify any investment that could give rise to a claim under NAFTA Article 1110.

International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right. (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 88 (Dec. 12). In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was "unable to see in [claimant's] original position – which was characterized by the possession of customers . . . anything in the nature of a genuine vested right." *Id*. The Court reasoned that "[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes." *Id*.; *see also* Rudolf L. Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 223-24 (1956) ("La clientèle, notion intimement liée à celle de la liberté du commerce et de l'industrie, n'est pas plus que cette dernière susceptible d'appropriation.") ("Clientele, a notion intimately linked to that of liberty of commerce and industry, is no more capable of expropriation than the latter.") (emphasis omitted; translation by counsel). Because customers and goodwill are not, by themselves, property rights capable of being expropriated, they

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"share, right, or title in property"); OXFORD AMERICAN DICTIONARY 463 (1980) (defining "interest" as "a legal right to a share in something, a financial stake in a business etc.").

similarly cannot constitute property rights or interests under subparagraphs (g) or (h) of Article 1139.

Finally, this conclusion is confirmed by the interpretive rules of *noscitur a sociis* – "a word is known by the company it keeps" – and *ejusdem generis* – general words are limited by the meaning indicated by accompanying specific words. *See, e.g.*, *Northern Cameroons*, (Cameroon v. U.K.) 1963 I.C.J. 15, 91 (Dec. 2) (sep. op. Spender, J.); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); PIERRE-ANDRÉ CÔTÉ, THE INTERPRETATION OF LEGISLATION IN CANADA 241-49 (1984). Courts regularly use these principles "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth'" to the language. *Gustafson*, 513 U.S. at 575 (citation omitted).

The examples provided in subparagraph (h) of "interests" that arise from the commitment of capital or other resources to economic activity are property interests under various types of contracts and concessions. By contrast, a customer is not an interest acquired under a contract, but rather someone *with whom* one contracts. Given the conceptual difference between the types of property interests listed as examples to subparagraph (h) and Methanex's claims here, it would be unreasonable to ascribe so broad a meaning to subparagraph (h) as Methanex suggests.[46]

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[46] The United States notes Article 1110(2)'s provision that "[c]ompensation [for expropriation] shall be equivalent to the fair market value of the expropriated investment. . . . Valuation criteria shall include going concern . . . . " It acknowledges that goodwill and future profits may be considered by a tribunal in determining the going-concern value when an enterprise in its entirety has been expropriated. However, goodwill and future profits are not property, by themselves, that can serve as the basis for an expropriation claim under Article 1110.

2. Maintenance of a certain rate of profit is not an investment capable of giving rise to an expropriation claim

Methanex's claim, in essence, boils down to an expectation that it would make a certain rate of profit on methanol sales to a specific market segment and that the California actions have adversely affected that expectation. Such an expectation cannot form the basis for an expropriation claim, however. "Expectations" are not property rights that may be expropriated.[47] The definition in Article 1139 was intended to reflect and, in some cases, limit the customary international law notion of "property" that could be the subject of expropriation. That definition, however, does not list a mere expectation of future profits as an "investment" protected under Chapter Eleven. Nor does customary international law recognize maintenance of a certain rate of profit as property or a property right that can be expropriated.

Thus, an international tribunal denied a claim for expropriation where the claimant alleged that the imposition of an allegedly burdensome series of license fees had rendered its business unprofitable. *See Kügele v. Polish State* (Germ. v. Pol.), *reprinted in* ANN. DIG. 1931/1932, at 69 (Upper Silesian Arbitral Trib. 1932). There, the tribunal noted that:

> there is an essential difference between the maintenance of a certain rate of profit in an undertaking and the legal and factual possibility of continuing the undertaking. The trader may feel compelled to close his business because of the new tax. . . . But this does not mean that he has lost the right to engage in the trade.

Similarly, in rejecting a claim for expropriation where the applicant contended that European Community regulations resulting in the oversupply of low-priced, dry skim milk

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[47] Similarly, although Methanex claims in its Reply that the phrase "tantamount to . . . expropriation" is broad enough to encompass its claims, in addition to providing no support for this erroneous view, it nowhere

products used for animal feed had the effect of decreasing demand for its competing product and would cause its business to close down, the European Court of Justice held that:

> [t]he measures adopted by the Commission do not deprive the applicant of its property or the freedom to use it and therefore do not encroach on the substance of those rights. Even though those measures may . . . have a detrimental effect on sales of its products, that negative effect cannot be regarded as an infringement of the substance of those rights, particularly where . . . the detrimental effect is merely an indirect consequence of a policy with which aims of general public interest are pursued . . . .

Case 59/83, *SA Biovilac NV v. European Economic Commt'y*, [1984] E.C.R. 4057, at IV(A)(3) (1984); *see also* GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) ("A property right, in order to qualify for the protection of the international law rules must be an actual legal right, as distinct from a mere economic or other benefit, such as a situation created by the law of a State in favour of some person or persons who are therefore interested in its continuance."). Because Methanex claims no more than lost future profits without identifying any property right that has been expropriated, this Tribunal lacks jurisdiction over Methanex's Article 1110 claim.[48]

B. Methanex's Article 1105(1) Claim Is Inadmissible On Its Face

Methanex's Article 1105(1) claim similarly fails to identify any right on which that claim could be based: there is no international law standard incorporated into that Article that is

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explains how its interpretation of that phrase creates an *investment* as required by Article 1139. *See* Reply to the Statement of Defense at 13 ¶ 71.

[48] Methanex's remaining allegations all fall into the category of future lost profits. Methanex alleges that its access to the U.S. market is a property right that is subject to protection under Article 1110 and has been expropriated. *See* Reply to the Statement of Defense at 13 ¶ 70. It cannot be disputed, however, that Methanex's right of access to the U.S. market, including its access to the California market, is not affected by the California actions. Methanex US has not been deprived of any right to sell its product, methanol, anywhere in the United States. Methanex's claim is, essentially, that certain of its customers will be inclined to buy less methanol. This claim implicates Methanex's expectations of future sales to those customers, not its access to those customers.

implicated by the measures in question. In the discussion that follows, the United States first demonstrates that the standards of treatment contemplated by Article 1105(1) are those established by customary international law. Second, the United States shows that no standard of customary international law incorporated into Article 1105(1), whether substantive or procedural, is implicated by the acts alleged to be wrongful here. Finally, the United States demonstrates that Methanex's attempt to salvage its Article 1105(1) claim by recharacterizing the Executive Order as an implementation of the Bill rather than a measure in its own right is without substance.

1. Article 1105(1)'s standards are those of customary international law

Article 1105(1) requires a NAFTA State Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The obligation of Article 1105(1), by its plain terms, is to provide "treatment *in accordance with international law*." "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to international custom.

Methanex's suggestion that Article 1105(1), and in particular its reference to "fair and equitable treatment," can be applied without reference to customary international law is rebutted not only by the plain language of the Article, but also by the historical context of the words "fair

and equitable" in the Article. The most direct antecedent to the usage of "fair and equitable treatment" in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property, which was first proposed in 1963 and revised in 1967.[49] The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that the standard reflected the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States":[50]

> The phrase "fair and equitable treatment" . . . indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that . . . protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the "minimum standard" which forms part of customary international law.[51]

In addition, in 1984, the OECD's Committee on International Investment and Multinational Enterprises surveyed the OECD member States on the meaning of the phrase "fair and equitable treatment." The committee confirmed that the OECD's members – the world's principal developed countries – continued to view the phrase as referring to principles of customary international law.[52] Thus, from its first use in investment agreements, "fair and

[49] *See* UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 54 (1998) ("The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.").

[50] OECD, 1967 Draft Convention on the Protection of Foreign Property, *reprinted in* 7 I.L.M. 117, 119 (1968).

[51] *Id.* at 120.

[52] OECD, Commitee on International Investment & Multinational Enterprises, Intergovernmental Agreements Relating to Investment in Developing Countries, ¶ 36 at 12, Doc. No. 84/14 (May 27, 1984) ("According to all Member countries which have commented on this point, fair and equitable treatment introduced a

equitable treatment" was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated "fair and equitable treatment" into its various bilateral investment treaties ("BITs").[53]

In the ensuing years, as international investment treaties incorporating variants of the OECD Draft Convention's formulation of "fair and equitable treatment" became more common, an academic debate emerged concerning the meaning of the phrase as it appears in those agreements without express reference to customary international law.[54] The prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment.[55] A few scholars contended that

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substantive legal standard referring to general principles of international law even if this is not explicitly stated . . . .").

[53] *See, e.g.*, Dep't of State, Letter of Submittal for U.S.-Bahrain Treaty Concerning the Encouragement and Reciprocal Protection in Investment, *reprinted in* S. Treaty Doc. 106-25 at viii (Apr. 24, 2000) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.").

[54] RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 59 (1995) ("Some debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept."); *see also* UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 53-54 (1998) (noting debate); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS & THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12 (1990) (same); Mahmoud Salem, *Les développements de la protection conventionelle des investissements étrangers*, 113 J. DROIT INT'L 579, 607-08 (1986) (same).

[55] *See* Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 178 (1980) ("On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques.") ("One thus references the classic principle of international law according to which States must provide foreigners in their territory the benefit of the international 'minimum standard,' that is, to accord them a minimum of personal, procedural and economic rights.") (translation by counsel); *see also* PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INT'L LAW 106 (1996) (standard U.S. BIT provision on fair and equitable treatment "relies upon already-existing requirements of international law, which binds each state to 'international minimum standards' of treatment even when there is no BIT in place"); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS & INT'L CHAMBER OF COMMERCE, BILATERAL INVESTMENT TREATIES 1959-1991 at 9 (1992) ("fair and equitable treatment . . . is a general standard of treatment that has been developed under customary international law").

the requirement of "fair and equitable" treatment announced a new, undefined conventional standard distinct from customary international standards – a subjective standard that left it to arbitrators to determine in each case "whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[56]

Against this backdrop, the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard. Article 1105(1)'s provision for "treatment in accordance with international law, *including* fair and equitable treatment" (emphasis supplied) clearly states the primacy of customary international law.[57] If this were not enough, the heading of Article 1105(1) – "Minimum Standard of Treatment" – confirms the applicability of the customary international minimum standard. Finally, Canada's Statement on Implementation of the NAFTA clearly notes that Article 1105(1) "provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law*."[58]

For these reasons, the United States disagrees with the discussion of "fair and equitable treatment" in the award by the Chapter Eleven arbitral tribunal in *Metalclad Corporation v.*

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[56] F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 238 (1990); *see also* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS & THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES 12-13 (1990).

[57] *See* RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 60 (1995) (although the formulation of "fair and equitable treatment" in some BITs suggests "a self-contained standard," in the NAFTA, "the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law").

[58] Dep't of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation, in* CANADA GAZETTE 68, 149 (Jan. 1, 1994) (emphasis added).

United Mexican States, ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000). Although the award's sparse statement of reasons leaves some doubt, it appears to apply a "fair and equitable" standard without an evaluation of customary international law on the subject. To the extent that *Metalclad* can be read to suggest that "fair and equitable" in Article 1105(1) articulates a standard other than the international minimum standard, it is wrongly reasoned and should not be followed here.

2. No customary international law standard incorporated into Article 1105(1) applies to the acts at issue here

The "international minimum standard" is an umbrella concept incorporating a set of rules that have over the centuries crystallized into customary international law in specific contexts.[59] The American Law Institute's *Restatement* frames the standard in the following terms:

> The international standard of justice . . . is the standard required for the treatment of aliens by
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> (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

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[59] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) ("there is no single standard but different standards relating to different situations."); *see also id*. at 529 ("The basic point would seem to be that there is no single standard."); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970) ("La grande majorité de la doctrine estime qu'il existe à cet égard un standard international minimum suivant lequel les Etats sonts tenus d'accorder aux étrangers *certains droits*, . . . même dans le cas où ils refuseraient ce traitement à leurs nationaux.") ("The great majority of commentators hold that there exists in this respect an international minimum standard according to which States must accord to foreigners *certain rights* . . . , even where they refuse such treatment to their own nationals.") (emphasis supplied; translation by counsel); *cf.* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 373 (4th ed. 1999) ("De la pratique relative au traitement minimum on ne saurait en effet attendre des énoncés catégoriques ; elle repose sur une casuistique fine, qui tient largement compte de la situation d'espèce . . . .") ("Of the practice concerning the minimum treatment one cannot make categorical pronouncements; the practice rests on a fine analysis, which largely takes into account the particular circumstances of the case . . . .") (translation by counsel).

(b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.[60]

The relevant principles are generally grouped under the heading of State responsibility for injuries to aliens.[61] This body of law includes standards for denial of justice, expropriation and other acts subject to an absolute, rather than a relative, standard of international law.[62]

No international standard incorporated into Article 1105(1), however, is implicated by the measures at issue here. Methanex asserts essentially two complaints concerning the Bill and the Executive Order. First, it complains about the *process* by which the measures were adopted. It asserts that the Executive Order was "based on a process which lacked substantive

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[60] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165(2) (1965); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 reporters' note 13 (1987) (noting that "[t]he previous Restatement dealt with economic injuries to aliens in [thirteen different sections]. The subject is treated here in fewer sections, . . . but without major change in substance.").

[61] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531 (5th ed. 1998) (referring to "general principles of state responsibility . . . applicable to cases where aliens are injured . . . ."); *accord* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 373 (4th ed. 1999) ("L'étalon international qui permet de répondre à ces questions [du traitement minimum international] . . . recoupe inévitablement celui dont on use plus généralement pour déterminer les obligations résultant pour l'État de son titre territorial . . . et comporte des obligations d'abstention et d'action.") ("The international standard that addresses these questions [of international minimum treatment] . . . inevitably overlaps with that which one uses more generally to determine a State's obligations resulting from its territorial authority . . . and contains obligations to act and to abstain from acting.") (translation by counsel).

[62] *See, e.g.*, Swiss Dep't of External Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 179 (1980) ("Pour ce qui est de ce standard, nous pouvons nous borner à en décrire le contenu en ce qui concerne les droits patrimoniaux des étrangers puisque l'article 2 de l'API touche au 'traitement juste et équitable' des seuls 'investissements'. Sur ce point, il convient de faire les constatations suivantes : . . . la propriété étrangère ne peut être nationalisée ou expropriée que moyennant le versement sans retard d'une indemnité effective et adéquate. L'étranger doit également pouvoir accéder aux voies judiciaires pour se défendre contres les atteintes portées à son patrimoine par des particuliers. De plus, il peut exiger que sa personne et ses biens soient protégés par la force publique en cas d'émeutes, lorsqu'il existe un état d'urgence, etc. . . . . L'expression 'traitement juste et équitable' se rapporte à l'ensemble de ces éléments.") ("So far as the content of this standard is concerned, we can limit ourselves to describing it as it relates to the property rights of foreigners since article 2 of the BIT addresses 'fair and equitable treatment' of only 'investments.' On this point, it is appropriate to note the following: foreign property can be nationalized or expropriated only upon prompt payment of an effective and adequate indemnity. The foreigner must also have access to the judiciary to defend himself against wrongful acts against his property by individuals. Moreover, the alien may require that his person and his goods be protected by the authorities in the event of riots, in a state of emergency, etc. . . . . The expression 'fair and equitable treatment' encompasses the ensemble of these elements.") (footnotes omitted; translation by counsel).

fairness"; "was based solely on the UC Report" and that the report in turn lacked "a proper risk characterization"; relied on "an extraordinarily scant database . . . and broad assumptions"; "contained a badly flawed exposure assessment and cost/benefit analysis"; and failed adequately to "discuss alternative solutions and remediation." Statement of Claim ¶¶ 32-33. Second, Methanex complains about the *substance* of the measures, asserting that the measures were "arbitrary" and "go[] far beyond what is necessary to protect any legitimate public interest." *Id.* ¶ 33.

However, as confirmed in the accompanying Expert Report of Detlev F. Vagts, Bemis Professor of Law at Harvard Law School and reporter for the *Restatement (Third) of Foreign Relations Law of the United States*, customary international law imposes no constraints on the *processes* by which States adopt executive or legislative measures such as these. As Professor Vagts recognizes, there is "no rule of customary international law that imposes constraints on the process by which States exercise their jurisdiction to prescribe. The variety of legislative and administrative procedures for laying down rules is so great – involving federal States and centralized States, parliamentary States and presidential States, democratic States and authoritarian States – that no general international consensus on what is a fair process has emerged or even been proposed." Vagts Rep. ¶ 15.[63] Methanex's assertions directed to the process by which the challenged measures were issued are misplaced.

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[63] *See also* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 376 (4th ed. 1999) ("L'Etat (ou ses démembrements) peut-il . . . par une norme objective (loi) . . . porter atteinte à une situation légale constituée sur la base de son droit par un étranger ? . . . . Le pouvoir de légiférer et de modifier la législation est un attribut étatique incontesté en droit international . . . .") ("Can a State (or one of its instrumentalities) . . . by an objective norm (law) . . . violate a legal situation of a foreigner based on the State's law? . . . . The power to legislate and to modify legislation is an attribute of the State uncontested by international law . . . .") (translation by counsel).

Nor can Methanex identify any *substantive* obligation of "treatment in accordance with international law" implicated by the measures at issue here. The principal substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation recognized in Article 1110.[64] For the reasons already expressed, however, Methanex can identify no "investment" on which an expropriation claim could be founded on these allegations. There is no other substantive international standard applicable to this case under Article 1105(1). Methanex has identified none.

At bottom, Methanex's claim is founded on a disagreement with the policy judgments that underlay the California Governor's decision to task state agencies with taking action toward a ban of MTBE in the state's gasoline. No standard of customary international law, however, guarantees a right to measures that an alien agrees with. Methanex's Article 1105(1) claim is inadmissible.

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[64] *See* Vagts Rep. ¶¶ 16-17; ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 168 (1949) ("With regard to the legislative power, no general customary rule limiting the legislative power of [a] State to legislation not interfering with vested rights, or making internationally illegal, legislation infringing vested rights and therefore rendering a State internationally liable for it, has ever been shown to exist . . . ."; noting only substantive obligation to pay compensation for expropriation); *see also* 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 44-66 (1970) (extensive analysis of State responsibility for legislative acts that identifies three categories of legislative acts that implicate State responsibility: expropriation, promulgation of a law contrary to international agreements and failure to promulgate a law required by international agreement or to abrogate a law inconsistent with an international agreement); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-196 & introductory note to ch. 2 (1965) (extensive review of substantive principles of State responsibility for injury to aliens, in which sections 178-183 "relate to applications of this [international minimum] standard to the procedure followed by a state in the administration of justice, as distinct from the provisions of its substantive law"; remaining sections address expropriation, breach of contract and prohibition on gainful activity by aliens).

3. Methanex's characterization of the Executive Order as "implementing" the Bill cannot salvage its Article 1105(1) claim

Methanex's assertion that "there is an international law principle requiring procedural, as well as substantive fairness, in the application and implementation of executive or legislative measures to the investments of foreign investors" misses the point. Claimant's Reply to the Statement of Defense ¶ 22. The United States agrees that the principles of State responsibility for injuries to aliens include requirements of a minimum standard of procedural and substantive fairness in criminal, civil and administrative adjudicatory proceedings to which an alien is a party (and in which legislative or executive measures are often applied).[65] Those principles, however, have no application to the measures at issue here. *See* Vagts Rep. ¶¶ 11-15.

The Executive Order – even if viewed, as Methanex would have it, as a ban of MTBE in California's gasoline (which, as detailed in Part IV below, it is not) – was not an application of existing law to any particular person in a specific instance. Instead, to use the NAFTA's terminology, it was at best an "administrative ruling of general application."[66] Because the Executive Order does not deal with any particular alien (or US investment of a Mexican or Canadian investor), the principles referenced by Methanex have no application here.

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[65] *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-182 (1965) (stating rules for denial of procedural justice, arrest and detention, denial of fair trial or other proceeding, unfair trial or other proceeding and unjust determination); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 38, 69-71 (1970) (collecting authorities recognizing State responsibility for acts by administrative officers against specific aliens, including murder, arbitrary expulsion, arbitrary arrest and arbitrary detention, and acts by judicial officers in cases to which aliens were a party, including refusal to adjudicate, inexcusable delay in administering justice and pronouncement of a manifestly unjust judgment). A number of rules traditionally grouped under the heading of State responsibility for injury to aliens address the relationship between States and natural persons of foreign nationality. Such rules are not relevant here.

[66] NAFTA art. 1806 ("administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include: (a) a determination or ruling made in an administrative

Administrative rulings of general application are, from the perspective of customary international law, closely related to legislative acts.[67] As discussed above, customary international law imposes no procedural constraints on the adoption of such measures and the substantive constraints, such as the rule barring expropriation without compensation, have no application here.

III. THE SUBJECT MEASURES DO NOT "RELATE TO" METHANEX OR ITS INVESTMENTS

The "Scope and Coverage" of Chapter 11 are limited to "measures adopted or maintained by a Party *relating to*: (a) investors of another Party; [or] (b) investments of investors of another Party in the territory of the Party." NAFTA art. 1101(1)(a)-(b) (emphasis added). This Tribunal lacks jurisdiction over Methanex's claims because the subject measures do not "relate to" Methanex or its investments within the meaning of Article 1101(1).

Measures of general applicability – especially ones such as those at issue here that are aimed at the protection of human health and the environment – are, by their nature, likely to affect a vast range of actors and economic interests. Given the potential of such measures to affect enormous numbers of investors and investments, with respect to any such specific measure, there must be a legally significant connection between the measure and a claimant

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or quasi-judicial proceeding that applies to a particular person, good or service of another Party in a specific case; or (b) a ruling that adjudicates with respect to a particular act or practice.").

[67] *See* Vagts Rep. ¶¶11-12; *see also, e.g.*, 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 230-31 (1987) (Although a State's jurisdiction to prescribe was traditionally viewed as "legislative jurisdiction" in international law, today "much regulation is effected through administrative rules and regulations, through executive acts and orders, and sometimes by court decree." Accordingly, the

investor or its investment. Otherwise, untold numbers of local, state and federal measures that simply have an incidental impact on an investor or investment might be deemed to "relate to" that investor or investment. That would be an unreasonable result, especially in the context of Chapter Eleven – a waiver of sovereign immunity that allows for the recovery of monetary damages against a State.

Clearly, here, there is no legally significant connection between the subject measures and Methanex or its investments, just as there is no legally significant connection between the subject measures and suppliers of any other materials, equipment, utilities or other services to MTBE producers. The subject measures do not even regulate Methanex or its investments, and Methanex does not allege the contrary. Nor do the subject measures affect Methanex or its investments in any other legally significant way.

On its face, there is no connection between the Bill and Methanex or its investments. The Bill simply authorized funding for a study of MTBE's environmental and public health effects, *see* Bill §§ 3(a)-(c), and directed the Governor, based on that study, certain federal agencies' assessments of the study, and related public testimony, "to take appropriate action to protect public health and the environment." *Id.* at §§ 3(e)-(f). Likewise, there is no connection between the Executive Order and Methanex or its investments because the Executive Order merely directed certain California agencies to undertake actions including, *inter alia,* the establishment of a timetable for the phaseout of MTBE by December 31, 2002 and the promulgation of the CaRFG3 regulations by December 1999. Executive Order at 2 ¶¶ 4, 6.

Restatement refers to all such regulation as falling under the heading of "*jurisdiction to prescribe, i.e.*, the authority of a state to make its law applicable to persons or activities.") (emphasis in original).

Thus, no connection exists between the Bill and Executive Order and Methanex or its investments in any way that is significant with respect to the obligations of Chapter Eleven.

Moreover, even assuming that the subject measures would result in the phaseout of California gasoline containing MTBE, there is no legally significant connection between those measures and Methanex or its investments. A ban on MTBE allegedly would affect Methanex and its investments only by eliminating a sub-market for methanol, lowering the price of methanol, or both: *i.e.*, by affecting the profitability of Methanex and its investments. This potential effect, however, does not establish a cognizable connection between the subject measures and Methanex or its investments: just as there would be no legally significant connection between, for example, a regulation limiting emissions of air pollutants and sellers of asthma remedies, there is no such connection between the subject measures and suppliers of methanol (or any other materials, equipment, utilities or services) to MTBE producers.

Thus, this Tribunal lacks jurisdiction over Methanex's claims because the Bill and Executive Order do not "relate to" Methanex or its investments.

IV. METHANEX HAS NOT INCURRED COGNIZABLE LOSS OR DAMAGE UNDER ARTICLE 1116

Methanex's pleadings also fail on their face to satisfy another jurisdictional prerequisite set forth in Article 1116, namely, the requirement that an investor must have "incurred *loss or damage* by reason of, or arising out of, [a measure]" in order to submit a claim to arbitration. (Emphasis supplied.) Here, the alleged breach is California's adoption of the Bill and the Executive Order. Methanex attributes all of its alleged losses to a ban on the use of MTBE in

California's gasoline. However, the measures challenged by Methanex do not effect such a ban. Neither measure could have caused Methanex to incur any compensable loss or damage.

A. The Bill Could Not Be The Source Of Any Loss Or Damage To Methanex

The Bill appropriated money to the University of California for it to conduct a study of the benefits and risks, if any, of using MTBE in California's gasoline.[68] The Bill also directed the Governor to take "appropriate action" if, after reviewing the UC Report, the assessment of the UC Report by the United States Geological Survey and the Agency for Toxic Substances and Disease Registry and public testimony pertaining to the UC Report, he determined that the use of MTBE in California's gasoline posed a significant risk to human health or the environment.[69]

The appropriation of money for a university research report cannot be deemed to have caused Methanex any compensable loss or injury. A contrary determination would lead to absurd results: any time a government-financed research report or study was relied upon by a government official or agency in its decision to take action, an investor who disagreed with such action could challenge the government's decision to fund the study that was relied upon. It is common practice for governments to fund a variety of scientific research. The NAFTA Parties could not have intended those funding decisions to form the basis of a violation of Chapter Eleven of the NAFTA.

Neither could the Bill's provision requiring the Governor to take "appropriate action" in response to the UC Report, its peer-reviewed comments and public testimony be deemed to have caused Methanex any cognizable loss or injury. Inherent in the duties of government

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[68] Bill § 3(a).

officials is the obligation to take "appropriate action" in response to all kinds of events and information. An explicit invitation for a particular government official to exercise such authority cannot, by itself, be deemed the cause of any alleged loss or injury that could give rise to a NAFTA Chapter Eleven claim.

B. The Executive Order Could Not Be The Source Of Any Loss Or Damage To Methanex

1. The Executive Order does not ban MTBE

Similarly, the Executive Order could not have caused Methanex any cognizable loss or injury. As confirmed in the accompanying Expert Report of Joseph R. Grodin, former Justice of the California Supreme Court and Court of Appeal and Professor of California constitutional law at Hastings College of the Law, the Executive Order does not ban MTBE. *See* Expert Report of Joseph R. Grodin dated November 10, 2000 ("Grodin Rep.") ¶ 23. Rather, the Executive Order merely directs certain California agencies to take action in anticipation of the potential promulgation of regulations that would prohibit the use of MTBE in California's gasoline. *Id*. ¶¶ 21, 22.

The Executive Order altered the legal rights and obligations of no member of the public. "An executive order . . . is a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides subordinate officers in the enforcement of a particular law." Opinion No 80-511, 63 Ops. Cal. Att'y Gen. 583, 1980 WL 96881 (July 3, 1980); *see also* Opinion No 92-804, 75 Ops. Cal. Att'y Gen. 263, 1992 WL 469727 (Nov 12, 1992) ("an executive order is generally regarded as 'a formal written directive of the

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[69] *Id*. § 3(e)-(f).

Governor.'"). Here, the Executive Order did nothing other than direct agency officers to begin the preparatory work that might lead to the promulgation of regulations with legal force. *See* Grodin Rep. ¶¶ 21, 22. Such regulations did, of course, eventually come into force – but these regulations are not part of this case. The Executive Order did not have the effect of eliminating the use of MTBE in California's gasoline, nor did it have any legal effect on Methanex or its U.S. affiliates. *See id.* ¶¶ 22-23.

This conclusion is further confirmed by the fact that the California Legislature has delegated its authority to legislate gasoline formulations for environmental purposes to California's environmental agencies, including the CARB.[70] The Bill reflects this delegation: it does not vest the Governor with the authority to ban MTBE in gasoline but, rather, requires only that the Governor take "appropriate action" in response to the UC Report. The Executive Order accordingly merely directed state agencies to exercise their quasi-legislative powers as authorized by legislative delegation.

Moreover, subsequent actions of the California agencies and California Legislature clearly illustrate that the Executive Order did not have the effect Methanex asserts.[71] Methanex offers no explanation as to why the California Legislature would, months after the Executive Order was issued, enact legislation calling for establishment of a timetable for removal of MTBE from gasoline if, as Methanex suggests, a ban was already in place. Nor does Methanex explain why, if a ban were already in effect, California agencies spent months conducting

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[70] *See* CAL. HEALTH & SAFETY CODE §§ 39500, 43013, 43013.3, 43018, 43830, 43830.8 & 43833 (Deering 2000).

[71] *See* S.B. 989, 1999-00 Reg. Sess. (Cal. 1999) (directing, *inter alia*, the California Energy Commission to develop a timetable for the removal of MTBE from California gasoline and mandating that CaRFG3

research, deliberating, conducting public hearings and workshops and promulgating final CaRFG3 regulations that do contain a future ban on sales of California gasoline containing MTBE.

Finally, even Methanex did not view the Executive Order as self-executing at the time of its issuance.[72] On March 30, 1999, the President and Chief Executive Officer of Methanex told stock analysts and financial reporters that:

> [The Governor] has asked the California EPA to implement this Executive Order, which really means that he's asking the California Energy Commission and the California Air Resources Board to come up with a timetable, by July 1 of this year, for removal of MTBE by 2003. . . . The debate in California is surely not over. This needs to go through the legislature . . . . So, there's still some debate to go, but I think from our perspective it is prudent to plan on the assumption that the Governor's order will be executed.

Pierre Choquette, *MTBE Conference Call Opening Remarks*, at 1-2 (Mar. 30, 1999). Methanex's contemporaneous remarks are difficult to reconcile with its present position that the Executive Order was a ban.[73]

In sum, it is the CaRFG3 regulations that will ban the sale of California gasoline containing MTBE as of December 31, 2002, not the Bill or the Executive Order. This fact alone disposes of Methanex's claim. Methanex does not challenge the promulgation of the

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regulations meet specified conditions regarding air quality, but without specifying a deadline for the removal of MTBE in California's gasoline).

[72] Methanex's actions are also inconsistent with its assertion that the Bill or the Executive Order banned MTBE. Eight months after the issuance of the Executive Order, Methanex bought out its joint venturer's 30% interest in the Fortier plant – conduct difficult to square with Methanex's legal claim that the Executive Order effected a devastating expropriation. *See* Methanex Statement of Claim at 3 ¶ 5.

[73] Statements such as these – made by an issuer of U.S. securities to a group of stock analysts and financial journalists – are subject to the United States securities laws. These laws impose stiff criminal penalties for knowingly making false or misleading statements, and provide for civil liability for recklessly making such statements. *See* 15 U.S.C. §§ 78j, 78ff (2000). Methanex's contemporaneous statements to its investors thus may not be lightly disregarded.

CaRFG3 regulations as a measure that violates Chapter Eleven in its Notice of Arbitration. The CaRFG3 regulations did not become effective until September 2, 2000 – ten months after Methanex filed its Notice of Arbitration in this case. Furthermore, the CaRFG3 regulations do not ban the use of MTBE in California's gasoline until December 31, 2002 – two years hence. Consequently, as discussed in further detail below, Methanex cannot have sustained any cognizable loss or damage before 2003.

2. A measure that is merely proposed may not be the subject of a NAFTA Chapter Eleven claim

The NAFTA makes clear the distinction between proposed measures and final measures. While a State may complain to another NAFTA Party about a *proposed* measure using the mechanisms set forth in Chapter Twenty, an investor bringing a claim under Chapter Eleven may not. *Compare* NAFTA art. 2004 ("this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties . . . wherever a Party considers that an action or *proposed* measure of another Party is *or would be* inconsistent with the obligations of this Agreement") (emphasis supplied) *with* NAFTA art. 1101(1) ("this Chapter applies to measures *adopted or maintained* by a Party") (emphasis supplied).

This distinction makes sense. Numerous bills, for example, are introduced into the legislature, many of which never become law and have no legal effect on the rights, obligations or property of foreign investors. Similarly, the executive branch of the government often takes action, as in this case, that has no effect on the public. If NAFTA Chapter Eleven liability could attach any time a government made a proposal or directed an agency to begin work, legislatures would be unable to debate proposals and governments would be paralyzed. The NAFTA

Parties could not have intended such an absurd result. Regardless of how Methanex couches the language of its claims, it is apparent that it is challenging California's ability to ban the sale of gasoline containing MTBE in that state – a measure that was not adopted and maintained by California until September 2000.

A similar situation arose in *Ethyl v.Canada*, 138 I.L.M. 798 (1999) (June 24, 1998) (Award on Jurisdiction), another Chapter Eleven claim, where the claimant challenged a Canadian law banning the gasoline additive MMT (the "MMT Act"). In that case, the claimant filed its notice of arbitration on April 14, 1997, but the MMT Act did not receive Royal Assent until April 25, 1997. Canada argued that the tribunal lacked jurisdiction because no legislative action short of a statute that has passed both the House of Commons and the Senate and has received Royal Assent constitutes a measure. The tribunal noted that "Canada argues, *not without effect*, that an unenacted legislative proposal, which is unlikely to have resulted in even a 'practice,' cannot constitute a measure." *Ethyl* at ¶ 67 (emphasis supplied). The United States submits that the *Ethyl* tribunal's view that the as-yet-unenacted MMT Act could not constitute a measure that could be challenged under Chapter Eleven was correct. Similarly, Methanex has no standing to challenge California's ban of MTBE in gasoline because as of December 1999, the date that it filed its notice of arbitration, that ban had not yet been enacted.[74]

[74] The fact that the *Ethyl* tribunal ultimately determined that it had jurisdiction does not argue in favor of this Tribunal reaching a similar result here. First, to the extent that the *Ethyl* tribunal determined that a jurisdictional defect could be unilaterally waived by the tribunal without the consent of the respondent NAFTA Party, the United States respectfully disagrees with that determination. The United States submits that it is not within the Tribunal's discretion to waive the fulfillment of any jurisdictional prerequisite set forth in Chapter Eleven. Second, Royal Assent is given as a matter of course once it is requested by the

Finally, an additional consideration counsels against a tribunal permitting a claimant to mischaracterize the nature of a measure by challenging what is, in essence, a proposed measure rather than a final one. Article 1121 requires a claimant to waive its rights to initiate or continue other proceedings in NAFTA countries with respect to the *measures* that the investor is challenging in the NAFTA Chapter Eleven arbitration. Thus, Methanex is currently free to challenge the CaRFG3 regulations in a United States court. If this Tribunal were to construe the Executive Order as a ban on the use of MTBE in California's gasoline – which it is not – this would give Methanex the opportunity to challenge that ban in both this arbitration and, if it were unhappy with the result, later in a United States court. NAFTA clearly does not contemplate such a result.

3. Methanex's Article 1110 claim is not ripe

A finding that this Tribunal lacks jurisdiction comports not only with the language of the NAFTA itself, but with the practice of international courts and tribunals which have declined to exercise jurisdiction or have dismissed claims where, as here, the challenged measure was not self-executing and, therefore, could not be deemed to have inflicted a cognizable injury upon the claimant.

The Iran-United States Claims Tribunal, for instance, applied this principle of customary international law in *Malek v. Iran*, Award No. 534-193-3, at ¶ 54 (U.S.-Iran Cl. Trib. 1992). In that case, an investor claimed that his property had been expropriated by virtue of the passage of an Iranian law that provided for seizure and sale of property under the supervision of

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Government. *See Ethyl* at ¶ 69. Here, however, the enactment and adoption of the CaRFG3 regulations were

a local prosecutor if an Iranian citizen acquired another nationality in violation of Iranian law. On November 5, 1980, the claimant became a naturalized United States citizen. His property was seized by Iran on February 28, 1981. The Algiers Accords that established the tribunal provided for jurisdiction to adjudicate claims for expropriation and interference with property rights that arose before January 19, 1981, the date of the Accords. The claimant contended that the effective date of the expropriation should be deemed to be November 5, 1980, the date that he became a citizen and his property thus became subject to seizure pursuant to Iranian law.

The tribunal dismissed the claimant's expropriation claim for lack of jurisdiction. It held that the Iranian law did not "trigger[] an automatic expropriation of his alleged landed properties as soon as he became an American citizen." The tribunal found that the law in question was not self-executing because, in order to consummate the sale of any property pursuant to the law, a procedure for the sale of the property had to be set in motion under the supervision of the local public prosecutor and a magistrate needed to issue an order to that effect. The claimant failed to demonstrate that any such order concerning his property had been issued between November 5, 1980 and January 19, 1981. Consequently, the tribunal held that the claim was outside the scope of its jurisdiction.

A similar result was reached in *International Technical Prods. Corp. v. Iran*, 9 Iran-U.S. Cl. Trib. Rep. 206 (1985) (Award No. 196-302-3). The claimant in that case challenged the issuance of an executive writ on September 2, 1980, notice of which was served on the claimant on November 9, 1981. The writ, in essence, constituted a demand for payment of a

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not a foregone conclusion even after the issuance of the Executive Order.

mortgage loan and threatened foreclosure in the absence of payment. According to Iranian law, a debtor has eight months from service of the writ to pay the debt and thereby retain title to the property. Alternatively, within six months of that same date (in this case, May 1982), the owner of the property has the right to request that the property be sold at auction with any surplus being returned to the debtor. On September 17, 1983, an Iranian bank foreclosed on claimant's property. The tribunal held that the claimant had not irreversibly lost possession and control of its property until May 1982 – well after January 19, 1981 – and it therefore lacked jurisdiction to hear the claim.

Other claims tribunals have similarly held that a claim for expropriation only becomes ripe when the alleged act of expropriation actually occurs. For example, in declining to exercise jurisdiction over a claim, the American and Panamanian General Claims Arbitration noted that:

> ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when legislation is passed which makes the later deprivation of possession possible. . . . Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country. . . . claims should arise only when actual confiscation follows.

Mariposa (U.S. v. Pan.), American and Panamanian General Claims Arbitration 577 (1933); *see also Electricity Co. of Sofia & Bulgaria* (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4) (dismissing portion of claim challenging Bulgarian tax law as discriminatory because the Government of Belgium, the claimant, had not demonstrated that a dispute relating to such law had arisen between the two governments as of the date that the claim was filed); *Pobrica* (Int'l Cl. Settlement Comm'n. 1953) (Amended Final Decision, on file with the U.S. Dep't of State)

("[T]he mere enactment of a law under which property may later be nationalized does not create a claim . . . . [A] claim for nationalization or other taking of property does not arise until the possession of the owner is interfered with."); *cf.* Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 213 (1956) ("Tout au plus peut-on considérer qu'une législation qui n'est pas auto-exécutoire, c'est-à-dire dont la mise en œuvre dépend d'un acte de l'exécutif, ne crée pas à elle seule la responsabilité internationale.") ("At most one can consider that a legislative act that is not self-executing, *i.e.*, which depends for its implementation on a act of the executive, does not create by itself any international responsibility.") (translation by counsel); Eduardo Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW 531, 546 (Max Sørensen ed., 1968).

Chapter Eleven of the NAFTA also recognizes the distinction between an action that indicates an intention to expropriate and an action that constitutes an expropriation. *See* NAFTA art. 1110(2) ("Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier."). This language is consistent with the rule that an expropriation ripens when an expropriation takes place, and not when events evidencing a future intent to expropriate an investment occur.

In this case, any injury allegedly suffered by Methanex concerning the prohibition of MTBE in California's gasoline could not possibly have been suffered any time prior to the adoption of the CaRFG3 regulations, which occurred on September 2, 2000. As in the cases

described above, the Executive Order did not effect a ban on the use of MTBE in California's gasoline and did not have any effect on Methanex's U.S. investments. Without action by CARB, no ban on the sale of California gasoline containing MTBE would have been adopted and no individual or entity could have been found to have violated the law for using or selling MTBE in California gasoline after December 31, 2002. *See* Grodin Rep. ¶ 25.

Finally, even if the Executive Order had the legal effect of banning the use of MTBE in California's gasoline as of December 31, 2002 (which it does not), this Tribunal would still lack jurisdiction because no ban would take effect until December 31, 2002 – more than two years from now. As of this date, Methanex cannot have suffered any cognizable loss or injury "by reason of, or arising out of," the adoption of the such a ban.[75] As demonstrated above, international tribunals have consistently dismissed claims on the grounds that the challenged law was not the act that actually caused the claimant injury even where the claimant suffered an injury subsequent to the issuance of the challenged law. *See, e.g.*, *Malek*, Award No. 534-193-3 (Iran-U.S. Cl. Trib. 1992) (passage of law did not effect an expropriation even where property subsequently seized pursuant to that law); *International Technical Prods.*, 9 Iran-U.S. Cl. Trib. Rep. 206 (issuance of writ did not effect an expropriation even where property later foreclosed on pursuant to that writ). Similarly, Methanex or its investments cannot be

[75] Again, Methanex's claims in this arbitration are difficult to square with its statement to its shareholders. Methanex recently reported in its *Interim Report to Shareholders for the Nine Months Ended September 30, 2000*, dated October 18, 2000, that "Methanol prices continue to be strong early in the fourth quarter. The price strength is due to strong demand across *all geographies* and *all end-use markets including MTBE*." (Emphasis supplied.)

deemed to have suffered any loss or injury as a result of a ban that does not go into effect until December 31, 2002.[76]

V. ARTICLE 1116 GRANTS NO JURISDICTION OVER CLAIMS FOR INJURIES ALLEGEDLY SUFFERED BY AN ENTERPRISE

Methanex's Notice of Arbitration and Statement of Claim identify Article 1116 of the NAFTA as the sole jurisdictional basis for its claims. Methanex's claims, however, are not claims of independent injury, but are, rather, merely derivative of injuries allegedly suffered by the enterprises that constitute its U.S. investments. Article 1116 provides no jurisdiction over Methanex's claim.

The NAFTA provides two separate jurisdictional bases for investors to bring claims against a NAFTA Party: Articles 1116 and 1117, each of which serves a distinct function. Article 1116 provides for claims for loss or damage incurred by an investor. Article 1117, on the other hand, addresses claims for loss or damage to an enterprise owned or controlled by an investor. *See* North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 145 ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor."). Because Methanex cannot claim any loss independent of that allegedly suffered by Methanex US and Methanex Fortier, it has no standing to bring a claim under Article 1116.

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[76] The United States does not concede that the California actions or the CaRFG3 regulations will cause

Methanex filed its Notice of Arbitration pursuant to Article 1116: thus, it brings a claim for alleged injury to itself suffered as a result of the United States' alleged treatment of its U.S. investments under Articles 1105(1) and 1110. Methanex seeks compensation for alleged losses:

> (1) to Methanex, Methanex US and Methanex Fortier of a substantial portion of their customer base, goodwill and market for methanol in California and elsewhere;
> (2) to Methanex, Methanex US and Methanex Fortier as a result of the decline in the global price of methanol;
> (3) to Methanex, Methanex US and Methanex Fortier on capital investments they have made in developing and serving the US market;
> (4) to Methanex due to the increased cost of capital; and
> (5) to Methanex of a substantial amount of its investment in Methanex US and Methanex Fortier.

Statement of Claim ¶ 38.

First, Methanex plainly has no standing to assert claims for injuries or losses that even it admits were suffered, if at all, by Methanex US or Methanex Fortier. Such losses can only be claimed under Article 1117. Consequently, this Tribunal does not have jurisdiction to hear claims for alleged injuries or losses to Methanex US and Methanex Fortier of their customer base, goodwill and market for methanol in California or elsewhere, or losses allegedly suffered by those U.S. investments as result of the decline in the global price of methanol or on capital investments they have made in developing and serving the U.S. market.

Second, Methanex lacks standing to assert its remaining claims because none of those alleged losses constitutes a direct injury to Methanex itself. To the contrary, all of Methanex's claimed losses are derivative of injuries that its U.S. investments have allegedly suffered. The classic example of a derivative injury is the one a shareholder experiences due to a loss in the

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Methanex any injury even after December 31, 2002.

value of its shares.[77] Methanex's claims of loss as a result of an increased cost of capital, its alleged loss of a substantial amount of its investment in Methanex US and Methanex Fortier, its alleged loss on capital investments that it made in developing and serving the U.S. market, as well as the decline in the global price of methanol are of a similar nature. All of these alleged losses are solely a consequence of the purported effect that the alleged MTBE ban has on the profitability of Methanex's U.S. investments. For this reason, Methanex's claims for these losses and injuries are outside of the scope of Article 1116 and, thus, not within this Tribunal's jurisdiction.

In addition, Methanex lacks standing under Article 1116 to assert a claim for loss of a substantial portion of its own customer base. To the extent that "its" customers are actually those of its affiliates and these customers allegedly choose not to use the marketing services of Methanex US or purchase methanol from Methanex Fortier, any loss to Methanex is purely derivative of losses to Methanex US and Methanex Fortier and cannot serve as the basis for an Article 1116 claim.

On the other hand, to the extent that Methanex attempts to assert a claim for alleged losses of its own customer base, goodwill and market for methanol, those claims are not cognizable. Articles 1105(1) and 1110 – the provisions invoked by Methanex –impose

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[77] *See, e.g., Walker v. Stones*, Transcript, *reprinted in* THE Times, Sept. 26-27, 2000 (U.K. Ct. App. July 19, 2000) (LEXIS, UK Cases Library, Combined Courts File) ("Where the shareholder's loss is not separate and distinct from but is reflective of the direct loss suffered by the company as a result of the defendant's conduct, then no personal loss from the dimunition in the market value of the shares arises and accordingly the shareholder has no right of action.") (citation omitted); *Perlman v. Salomon Inc.*, No. 92-5208, 1995 U.S. Dist. LEXIS 3030, at *10 (S.D.N.Y. 1995) ("It is a well-settled rule of law that . . . a decrease in the value of stock in and of itself is not an injury which confers standing to sue upon an individual stockholder.") (citations omitted); *see also Barcelona Traction*, 1970 I.C.J. 3, 33-34 ¶ 38 ("[W]henever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which

obligations with respect to *investments* of an investor of another Party, not with respect to the investor itself. Any loss Methanex may have suffered to its customer base, goodwill or market for methanol that is independent of the effect of the California measures on Methanex US and Methanex Fortier by definition cannot be based upon the United States's treatment of Methanex's U.S. investments and, therefore, is not cognizable under Articles 1105(1) and 1110 of the NAFTA. Put another way, any such loss would be suffered not in Methanex's capacity as an investor in the United States, but as a participant in the global methanol market in its own right. In this respect, Methanex is no different from any other Canadian or Mexican company that manufactures methanol and does not have an investment in the United States. No one would argue that those companies could challenge the California actions under Articles 1105(1) and 1110 of the NAFTA. Similarly, Methanex lacks standing to submit a claim for effects that the California measures may have on it that are in no way based upon the challenged actions' treatment of its investments made in the United States.

That Methanex lacks standing to assert its claims under Article 1116 comports with rules of customary international law.[78] It is well established in customary international law that corporations have a legal existence separate from that of their shareholders. *See Barcelona Traction,* 1970 I.C.J. 3, 34 ¶ 41. In *Barcelona Traction*, the International Court of Justice held that Belgium had no standing to bring a claim against Spain for the alleged expropriation of assets of a Canadian limited liability company, the shareholders of which were overwhelmingly Belgian. The Court held that the Belgian shareholders had no right to take action on behalf of

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rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.").

the corporation; if the corporation was injured, the corporation alone could act. Because the place of incorporation of Barcelona Traction Light & Power Co., Ltd. was Canada, the corporate entity was deemed to be Canadian: Canada alone had the right to espouse the claim. Central to the Court's analysis was the observation that:

> [n]otwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons.

Id. at 35 ¶ 44. *See also* Aréchaga, *Diplomatic Protection of Shareholders in International Law*, at 75 ("[I]f the acts complained of are directly aimed at the corporation as such and not directed against the shareholders' own rights . . . then it is only the corporation as such which will be called upon to act in municipal law and the State of nationality of the corporation [is] the only one which may take up its case in the international plane."); *Frenkel* (U.S. v. Aus.), Tripartite Claims Commission: Final Report of the Commissioner 111 (U.S.-Aus.-Hung. 1929); *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (U.S. v. Reparation Comm'n), 2 R.I.A.A. 778, 793 (1926) ("[O]nly the extent and not the nature or the essence of his rights can vary with the number of shares that a shareholder may possess . . . these rights must be identical, whether the company's shares are distributed among many holders or are owned by a single owner.").

The Court in *Barcelona Traction* also recognized, however, that there may be instances where a shareholder suffers a direct injury, in which case the shareholder (or, in cases

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[78] *See supra* at 12-13.

before the Court, where individual shareholders do not have standing, the State of which that shareholder is a citizen) would have standing to bring a claim:

> The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

Barcelona Traction, 1970 I.C.J. at 36 ¶ 47; *see also* Aréchaga, *Diplomatic Protection of Shareholders in International Law*, at 75 ("If such acts constitute 'a step directly aimed at his rights,' for instance, a confiscation of shares or a law restricting participation in assemblies or collection of dividends to national shareholders, then the State of nationality of any individual shareholder may interpose in his favour, irrespective of the nationality of the company.").

The NAFTA was drafted with this background of customary international law principles in mind. The drafters of the NAFTA were aware of the difference between direct injury to an investor and injury to an investment. The drafters also recognized that investors often choose to carry out their investment activities in a State through a locally-incorporated entity. However, because of the customary international law principle of non-responsibility, customary international law remedies were not available to remedy injuries to such locally-incorporated entities.[79] Thus, for example, no customary international law remedy could be sought against the

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[79] *See, e.g.*, *Forêts du Rhodope Central (Fond)* (Greece v. Bulg.), 3 R.I.A.A. 1389, 1421 (Mar. 29, 1933) ("A l'époque où s'est produit le fait dommageable – la prétendue confiscation des forêts – [deux des personnes en faveur desquelles la demande a été présentée] étaient donc incontestablement ressortissants du pays qui

United States on behalf of a United States corporation of which a Canadian investor was the sole shareholder.

To address this situation, the drafters of Chapter Eleven included Article 1117. Article 1117 creates a derivative right of action for the benefit of an *investor* that derogates from customary international law. By doing so, Article 1117 addresses the situation where the alleged violation of Chapter Eleven directly impacts a locally-incorporated subsidiary and also ensures that the claimant will be of a nationality different from that of the respondent State. *See* Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, in* THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) ("Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.").

The new right of action created by Article 1117 is a purely derivative right of action. The language of the article provides that it can be exercised only in cases where "*the enterprise*

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prenait les mesures incriminées. Dans ces conditions, il ne saurait être admissible, selon le droit international commun, de reconnaître au Gouvernement [demandeur] le droit de présenter des réclamations à leur profit pour ces faits dommageables, étant donné que ceux-ci ont été causés par leur propre Gouvernement.") ("At the time of the occurrence of the wrongful act – the supposed confiscation of forests – [two of the persons on whose behalf the claim was presented] were therefore indisputably nationals of the country that adopted the challenged measures. In these conditions, it would be impermissible, according to customary international law, to recognize in the claimant Government the right to present claims on their behalf for actionable damages, given that such damages were caused by their own Government.") (translation by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 483 (5th ed. 1998) (stating that in order for a claim to be admissible under international law, a claimant must "(*a*) hav[e] the nationality of the State by whom it is put forward, and (*b*) not hav[e] the nationality of the State against whom it is put forward").

[not the investor] has incurred loss or damage by reason of, or arising out of, the breach." Similarly, as Article 1135 makes clear, any award under Article 1117 for an injury to an enterprise must be paid to the enterprise, not to the investor. *See* NAFTA art. 1135(2)(b).

Thus, where an investor suffers a direct injury – for example, where the investor is denied its right to a declared dividend or its right to vote its shares – the investor has standing to bring a claim under Article 1116 in accordance with customary international law principles. Where, however, the alleged injury is suffered by the corporation itself – for example, where an asset held by the corporation is nationalized – Article 1117 provides a right of action for the investor on behalf of its investment. Without Article 1117, the investor would be denied a remedy because its injury is purely derivative of the corporation's and the locally-incorporated corporation would not have standing to bring a claim against the respondent State. The inclusion of Article 1117 in the NAFTA remedies this problem without extinguishing the distinction between direct and derivative injury or altering the general principle that the corporation, as opposed to its individual shareholders, may alone take action on behalf of the corporation.

As demonstrated above, all of Methanex's claimed injuries and losses are derivative of alleged injuries suffered by its U.S. investments. Methanex, accordingly, lacks standing to assert these claims pursuant to Article 1116 of the NAFTA.

VI. METHANEX HAS FAILED TO SUBMIT WAIVERS REQUIRED TO FORM AN AGREEMENT TO ARBITRATE THIS CLAIM

Methanex has failed to comply with the precondition set forth in Article 1121(b) of the

NAFTA by not providing the United States with an effective waiver of Methanex US' and Methanex Fortier's rights at the time it filed its Notice of Arbitration. This failure deprives this Tribunal of jurisdiction to hear Methanex's claim.

One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is that the investor and the enterprise must waive their rights to initiate or continue in other fora any dispute settlement proceedings to recover monetary damages with respect to the same measures challenged in the Chapter Eleven arbitration. NAFTA art. 1121(b). As the title to Article 1121 makes clear, such waivers are "Conditions Precedent to Submission of a Claim to Arbitration" under Chapter Eleven. The waiver required by Chapter Eleven must be legally valid. *See Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (June 2, 2000) (Arbitral Award). Methanex has not complied with this requirement.

A. The Instrument Submitted By Methanex On December 3, 1999 Does Not Constitute A Valid Waiver Of The Rights Of Methanex's U.S. Investments

Methanex attached as Schedule 1 to its Notice of Arbitration an instrument purporting to waive its own rights and the rights of Methanex US and Methanex Fortier. The instrument provides, in pertinent part (emphasis supplied):

> Methanex Corporation, in its own capacity *and on behalf of Methanex Methanol Company and Methanex Fortier Inc.*, hereby waives all rights to initiate or continue before any administrative tribunal or court under the laws of any Party to the North American Free Trade Agreement, or other dispute settlement procedures, any proceedings . . . .
>
> METHANEX CORPORATION
>
> /R Milner

Name: Randall Milner
Title: Corporate Counsel and Assistant Corporate Secretary[80]

Methanex Fortier is a Delaware corporation. Under conflict of laws principles, Delaware law determines the effectiveness of the purported waiver in this case because the law of the state of incorporation governs the effectiveness of acts taken on a corporation's behalf. *See generally* RESTATEMENT (SECOND) CONFLICT OF LAWS § 302(2) (1969) ("The local law of the state of incorporation will be applied to determine [the powers and liabilities of a corporation]."). It is a fundamental principle of the Delaware General Corporations Law that a corporation derives its authority to act from the board of directors. *See, e.g.,* 8 Del. C. § 141(a) (1999) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ."); *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983) (noting the "well settled rule that the Board of Directors manage the corporation").

Accordingly, only the board of directors of Methanex Fortier has the authority to waive the rights of that corporation.[81] *See* Expert Report of Prof. Robert W. Hamilton dated November 10, 2000 ("Hamilton Rep.") ¶ 14. An indirect shareholder of the corporation, such as Methanex, has no such authority. *Id.* Mr. Milner acting in his capacity as an officer of Methanex has no authority to waive Methanex Fortier's rights. *Id.* Indeed, the instrument provided by Methanex could not be clearer that Mr. Milner was executing it in his capacity as

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[80] Methanex Methanol Company is referred to in this Memorial as "Methanex US."

[81] While the board can delegate the day-to-day management of the corporation's affairs to corporate officers, it is doubtful – if one credits Methanex's contentions – that a waiver of the claims at issue here could be effected other than by the board itself. According to Methanex, its claims here are worth $970 million – some $270 million more than Methanex's total market capitalization in March 1999. *See* Reply to the

an officer of Methanex and not on behalf of, or as an officer of, Methanex Fortier. Thus, the instrument submitted as Schedule 1 to Methanex's Notice of Arbitration does not constitute a legally valid or effective waiver of Methanex Fortier's rights to initiate or continue all other proceedings for money damages. *Id.* ¶¶ 3, 14.

Nor does the instrument submitted as Schedule 1 constitute a legally effective waiver of Methanex US' rights. Methanex US is a Texas general partnership. A general partnership must act through its general partners and, pursuant to Texas partnership law, only a general partner has the authority to take action on behalf of the partnership. *See* Hamilton Rep. ¶ 15; Tex. Rev. Civ. Stat. art. 6132b-3.02(a) (Vernon 2000) ("an act of a partner, including the execution of an instrument in the partnership name, binds the partnership"). The general partners of Methanex US are Methanex, Inc. and Methanex Gulf Coast Inc., both Delaware corporations. Methanex claims to indirectly control and own all of the shares of Methanex, Inc. and Methanex Gulf Coast Inc. Neither of Methanex US' general partners, however, waived the partnership's rights. The declaration of an indirect shareholder of one of the general partners to the partnership that it waives those rights is legally insufficient. Hamilton Rep. ¶ 16. Mr. Milner, again, signed the instrument submitted as Schedule 1 in his capacity as an officer of Methanex, and not on behalf of, or as an officer of, either Methanex Inc. or Methanex Gulf Coast Inc. Thus, the instrument submitted by Methanex as Schedule 1 does not constitute a legally valid and effective waiver of Methanex US' rights. *Id.* ¶¶ 3, 16.

Statement of Defense ¶ 6. Waiving claims of that supposed magnitude would hardly be a day-to-day affair for any of the Methanex companies.

B. The Documents Submitted By Methanex On October 4, 2000 Do Not Comply With The Requirements Of Article 1121

In response to a document request made by the United States, on October 4, 2000, Methanex provided the United States with copies of a consent of the partners of Methanex US and unanimous written consents of the board of directors of Methanex Inc., Methanex Gulf Coast Inc. and Methanex Fortier. The written consents are all dated as of September 12, 2000. These consents purport to waive the rights of Methanex US and Methanex Fortier, as well as ratify the earlier acts taken by Mr. Milner with respect to attempts to waive those entities' rights. Methanex presumably will claim that these documents render the previously submitted instrument attached as Schedule 1 to its Notice of Arbitration effective.

The consents submitted by Methanex, however, do not comply with the requirements set forth in Article 1121(1)(b). Article 1121(1)(b) expressly provides that claimants and their investments must "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings *with respect to the measure* of the disputing Party that is alleged to be a breach referred to in Article 1116 . . . . " In each of the consents submitted by Methanex, however, the entity merely waives "all rights to initiate or continue . . . any proceedings *with respect to the Proceedings*" (emphasis supplied). In each consent, Methanex has defined "Proceedings" not as the measures in question but as this arbitration: "the proceedings by Methanex Corporation regarding the measure that is alleged to be a breach referred to in Article 1116 . . . . " The consents submitted by Methanex on October 4, 2000 are thus more narrow than those required by Article 1121(1)(b) of the NAFTA. Importantly, the waivers do not prevent Methanex US

or Methanex Fortier from challenging the subject measures in other fora, as required by Article 1121. Consequently, these documents cannot – even assuming that they had been properly authorized and timely presented – satisfy Methanex's jurisdictional obligations under Article 1121.

C. Methanex's Failure To Comply With Article 1121 Deprives This Tribunal Of Jurisdiction

Even if the documents submitted by Methanex on October 4, 2000 had effectively waived the rights of both Methanex US and Methanex Fortier, this Tribunal would still lack jurisdiction because Methanex failed to provide an effective waiver of Methanex US' and Methanex Fortier's rights at the time it filed its Notice of Arbitration. Consequently, Methanex has not met the terms of the United States' consent to arbitrate in Chapter Eleven.

NAFTA Article 1122(1) provides that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Thus, only when an investor has fulfilled each of the requirements set forth in Section B of Chapter Eleven has the NAFTA Party consented to have that investor's claim submitted to arbitration. *See Waste Management* at 12 ¶ 16; *see also id.* at 11 ¶ 14 ("it is fulfillment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognizance of any claim forming the subject of arbitration").

Submission of a waiver as required by Article 1121 must take place at the same time that a Notice of Arbitration is received in accordance with the UNCITRAL Rules. *See* NAFTA art. 1121(3); *Waste Management* at 13 ¶ 19. As the *Waste Management* Tribunal declared:

> NAFTA Chapter XI, Section B, Article 1121 lays down a series of conditions precedent to submission of a claim to arbitration proceedings, namely the placing on record of the Claimant's consent, as well as a waiver of its rights to initiate or continue before any administrative tribunal or court any proceedings . . . .

Id. at 10 ¶ 13 (emphasis in original). "[S]uch an abdication of rights ought to have been made effective *as from the date of submission of the waiver*, namely [the date of the filing of the Notice of Arbitration]." *Id*. at 16 ¶ 24 (emphasis supplied).[82]

That a legally effective waiver submitted with a Notice of Arbitration is a precondition to submission of a claim to arbitration comports not only with the language, but also with the purpose, of Article 1121 and Chapter Eleven as a whole. The purpose of requiring an investor to submit a legally effective waiver as a precondition of initiating an arbitration is to provide the respondent State with the necessary means to present that waiver to a court or administrative agency and have an action dismissed. This ensures that the respondent State will not be forced to defend itself in another forum once a Chapter Eleven claim is properly submitted to international arbitration.

Methanex's attempts to ratify Mr. Milner's earlier actions and render the previously submitted, defective waivers effective also fails. The consents submitted provide that:

> any and all action taken by any director or officer of [any partner on behalf of the Partnership], [or any director, officer or partner of the Partnership] [the Corporation] prior to the date this Consent is actually executed *in effecting the purposes of the foregoing resolutions* is hereby ratified, approved, confirmed, and adopted in all respects.

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[82] Even the dissent in *Waste Management* agreed that submission of a valid waiver was a precondition to jurisdiction. *See id*. at ¶ 58 (dissenting op.) ("If there is no title of jurisdiction, then the tribunal cannot act. Such would be the case here if the waiver under Article 1121 had never been given, or were defective.").

(Emphasis supplied.) As noted above, the "purpose of the foregoing resolutions" was for the entity in question to waive all rights to initiate or continue any proceedings "with respect to the Proceedings." The instrument submitted by Methanex on December 3, 1999, however, sought to waive Methanex US' and Methanex Fortier's rights to initiate or continue any proceedings "with respect to the measure that is alleged to be a breach referred to in Article 1116." Thus, even if the ratification were valid, these ratifications only ratified Mr. Milner's earlier acts to the extent that he sought to waive Methanex US' and Methanex Fortier's rights to initiate or continue other proceedings "with respect to the Proceedings." As discussed above, such a waiver does not comply with the conditions set forth in Article 1121.[83]

Conditioning jurisdiction on an investor's compliance with Article 1121, moreover, does not impose an undue burden on claimants. *First*, all that a claimant needs to do is to provide a waiver that recites the words contained in Article 1121. This is not hard to do. There is no mechanism other than conditioning the tribunal's jurisdiction upon the submission of proper waivers – as Chapter Eleven in fact provides – that can compel investors to submit waivers that are legally valid and effective.

Second, requiring that an investor submit a document that is properly authorized under the laws of the entity's organization so as to be legally effective under those laws is also

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[83] Even if the scope of the consents did not suffer from this defect, a later ratification of Mr. Milner's prior actions does not render the instrument submitted by Methanex on December 3, 1999 an effective waiver of Methanex US' and Methanex Fortier's rights as of that date. If an investor wishes to grant authority to an individual who is not otherwise authorized to take action to bind the enterprise, evidence of that authorization must be given to the respondent State at the time that the purported waiver is submitted. Otherwise, the State has no way to verify that the individual purporting to act on behalf of the enterprise has authority to bind the enterprise. It is clear from the text of the NAFTA that the United States did not consent to arbitrate when an investor fails to submit a legally valid and effective waiver at the time that it files its Notice of Arbitration.

reasonable and not unduly burdensome. In order to operate effectively in a host country, business entities need to follow these rules on a daily basis. Requiring that the person have authority to sign the waiver is a commonplace requirement that an enterprise must comply with in taking any steps to bind the enterprise including, for example, signing contacts and entering into leases. A company must act in the manner required by local law to bind the company in these myriad instances. The United States asks nothing more here.

D. The Tribunal Should Order Methanex To Submit Complying Waivers And Dismiss Methanex's Claim To The Extent It Relies On The Bill

The United States recognizes that if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, these proceedings would take longer to conclude and another tribunal would need to familiarize itself with all of the issues in this case. Recognizing this, in the interest of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members – on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers. This would ensure that these proceedings continue without undue disruption. It would also recognize that claimants may not be permitted to pursue arbitration when they have not complied with the jurisdictional requirements plainly set forth in Chapter Eleven.

If Methanex does submit waivers that comply with Article 1121, the United States will

seek an order from this Tribunal dismissing Methanex's claim to the extent that it relies on the Bill. Article 1116(2) of the NAFTA provides that:

> [a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The Bill is dated October 8, 1997. Methanex either acquired or should have acquired knowledge of the issuance of the Bill as of October 8, 1997. As of November 13, 2000, the date of this Memorial, Methanex has still not provided the United States with waivers that comply with Article 1121. Any effective waivers Methanex may provide will necessarily be submitted more than three years after issuance of the Bill. Consequently, the United States will seek dismissal of that portion of Methanex's claim that challenges the Bill as a measure that violates Chapter Eleven.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (*a*) in favor of the United States and against Methanex, rejecting Methanex's claims in their entirety and with prejudice; and (*b*) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that Methanex bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

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